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THE
SECOND PART
OF THE
INSTITUTES
OF THE
LAWS OF ENGLAND.

VOL. II.

THE
SECOND PART

OF THE

Institutes of the Laws of England.

CONTAINING

THE EXPOSITION OF MANY ANCIENT AND OTHER
STATUTES.

Jurisperito dixit, In lege quid scriptum est? quomodo legis? Luc. 10. 26.

Quod non lego, non credo. August.

*Jurisprudencia est juvenibus regimen, senibus solamen, pauperibus divitiarum,
& divitibus securitas.*

Authore EDUARDO COKE, MILITE, J. C.

Hæc ego grandævus posui tibi, candide lector.

167024.
10

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M.DCC.XCVII.

STATUTUM de WESTMINST. SECUNDO.

C A P. XIV.

[389]

CUM de vasto facto in hereditate alicujus per custodes, tenentes in stem, per legem Angliæ, vel aliter ad terminum vitæ, vel annorum, consueverit fieri breve de prohibitione vasti (1), per quod breve multi fuerunt in errore, credentes quod illi qui vastum fecerint, non habuerint necesse respondere, nisi tamen de vasto facto post prohibitionem eis directam, dominus rex (ut hujusmodi error de cætero tollatur) statuit, quod de vasto quocunque ad nocumentum alicujus facto, non fiat de cætero breve de prohibitione (2), sed breve de summonitione, ita quod ille, de quo queritur, respondeat de vasto facto quocunque tempore. Et si post summonitionem non venerit, attachietur, et post attachiamentum distringatur, et post districtionem, si non venerit, mandetur vicecom' (3), quod in propria persona, assumptis secum xii, &c. accedat ad locum vastatum (4); et inquiret de vasto facto (5), et retornet inquisitionem. Postquam retornata fuerit inquisitio, procedatur ad iudicium, secundum quod continetur in statuto prius edito apud Glocest', cap. 5. de vasto, 20 E. 1.

WHEREAS for waste done in the inheritance of any person, by guardians, tenants in dower, tenants by the courtesie of England, or otherwise for term of life, or years, a writ of prohibition of waste hath been used to be granted, by which writs many were deceived, thinking that such as had done the waste should not need to answer but only for waste done after the prohibition to them directed; our lord the king, to remove from henceforth this error, hath ordained, that of all manner of waste done to the damage of any person, there shall from henceforth be no writ of prohibition awarded, but a writ of summons, so that he of whom complaint is shall answer for waste done at any time; and if he come not after the summons, he shall be attached, and after the attachment he shall be distrained; and if he come not after the distress, the sheriff shall be commanded that in proper person he shall take with him twelve, &c. and shall go to the place wasted, and shall enquire of the waste done, and shall return an inquest, and after the inquest returned, they shall pass unto judgement, like as it is contained in the statute of Gloucester.

(Fitz. Waste, 129, 130, 131, 134, 135, 136, 137. Regist. 72, &c. 1 Brownl. 246. Dyer 304. 3 Cro. 18. 6 Ed. 1. Stat. 1. c. 3. 20 Ed. 1. Stat. 2. Rast. 697.)

(1) *Cum de vasto facto in hæreditate alicujus per custodes, &c. consueverit fieri breve de prohibitione vasti, &c.*] This error herein recited is hereby cleerly confuted, and hereof you may read more in the statute of Gloc.

(2) *Non fiat de cætero breve de prohibitione.*] By this the prohibition of waste, whereupon an attachment did lye, &c. is taken away, and in lieu thereof an action called here a writ of summons, because the writ beginneth, *Si A. fecerit te securum, &c. tunc summonneas per bonos summonitores, &c.* is given.

(3) *Ita quod respondeat de vasto facto quocunque tempore. Et si post summonitionem non venerit, attachietur, et post attachiamantum distringatur, et post districtionem, si non venerit, mandetur vicecomiti, &c.*]

If the defendant be returned *nihil, &c.* so as peradventure he was never summoned, nor any other writ served, whereby he might have notice, yet a writ of inquiry of waste shall be awarded by this branch; for here it is not specified that issues should be returned, &c. but generally and by the writ, the waste shall be inquired of by the oath of twelve men, where the defendant or any for him may attend if he will, and the jurors may finde against the plaintiffe.

Note the words here be, *et post districtionem, si non venerit, mandetur vicecomiti, &c.* So as if the defendant appear upon the distress, and plead, and after make default, the plaintiffe shall not by this branch have a writ to inquire of the waste, because it is out of the words and purview of this act.

(4) *Quod in propria persona sua assumptis secum duodecim accedat ad locum vastatum.*] Here are three things to be observed:

1. ^a That the sherife ought to go in proper person, for that, though in *rei veritate* he is no judge, yet this writ is in nature of a commission unto him, and he is in *loco judicis*, and therefore he ought to go in *propria persona*. If the sherife upon this writ return *quod mandavi balivo libertatis, &c. qui mihi nullam dedit responsonem*, the return is insufficient, because by the writ (as the book saith) he is a judge, and hath power to enter into the franchise.

2. ^b Where some have holden, that the sherife may inquire upon this writ by the oath of 6 or 8 persons, it appeareth, that there ought not to be under 12, for the words of this branch are, *assumptis secum 12*, yet this is but an inquest of office, for it is taken *sans mise des parties*, that is without any issue joyned.

3. ^c The sherife must go *ad locum vastatum*, together with the jurors, and view the same; for, *ista cadunt potius sub visu, quam sub auditu*.

(5) *Et inquireat de vasto facto.*] ^d If the waste be assigned in divers towns, the sherife and the jurors must view (as hath been said) all the places wasted in every of the towns, but he may inquire thereof in any one of the towns; and this copulative doth so knit the words together, as he cannot inquire of it in a forein town.

See more of this matter in the exposition upon the statute of Gloc. cap. 5.

Gloc. cap. 5.
4 E. 3. Waste
129. 15 H. 3.
ibid. 130.
Regist. 172.
F.N.B. 55.

21 H. 6. 56.
34 H. 6. 34.
11 H. 6. 3.

3 H. 6. 29.

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7 H. 4. 15.
12 H. 4. 3, 4.

^a Regist. judi.
22. 25. 27.
2 H. 4. 2.
3 H. 6. 29.
11 H. 6. 6.
11 H. 4. 82. lib.
4. fo. 65. Ful-
woods case, lib.
3. fol. 52.
Athams case.
^b F.N.B. 10. 7 c.
Regist. judic. ubi
130. 41 E. 3. 7.
43 E. 3. 19. 2 H.
4. 2. 3 H. 6. 29.
21 H. 6. 56.
34 H. 6. 12.
^c 16 E. 3. Return
de Vincour 82.
34 H. 6. 42. 44.
^d 16 E. 3. ubi sup.
34 H. 6. ubi sup.

CAP. XV.

IN omni casu quo minores infra aetatem implacitare possunt: concessum est, quod si hujusmodi minores elongati sint, quo minus personaliter sequi possint, propinquiores amici admittantur ad sequendum pro eis. Westm. 1. cap.

47.

IN every casewhereas such as be within age may sue, it is ordained, that if such within age be cloined, so that they cannot sue personally, their next friends shall be admitted to sue for them.

(Dyer, 104. 2 Ed. 3. 16. 40 Ed. 3. 16. Bro. Gardein, 13. 22. 24, 25, 26, 27. Regist. 78. 3 Ed. 1. c. 47.)

The act of W. 1. touching this matter was particular, but this W. 1. cap. 47. act is generall.

Upon this statute, whether the infant be esloigned or no, he shall sue by *prochein amy*, for the esloignment is put in this act, to shew what mischief may fall out in this case; and therefore when a sergeant offered, that oath should be made of the esloignment of the heir, the judge said, he would take it upon his honesty; but if the surmise that the plaintife is within age be untrue, and that the plaintife is of full age, his admittance by *prochein amy* is error.

See before in the exposition upon the 40 chapter of W. 1. where this matter is handled at large; and observe well our books, where many times a gardein is taken for a *prochein amy*, and a *prochein amy* for a gardein.

This act extends not to an ideot.

Regist. 78.
28 Aff. 22.
2 E. 3. 16.
40 E. 3. 6. 13 F.
3. Attorney 76.
34 H. 6. 4. 20 F.
4. 2. F. N. B. 27.
27 H. 8. fol. 11.

33 H. 6. 28.
F. N. B. 24. 5.

CAP. XVI.

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IN casu quo alicui minori descendat hereditas (2) ex parte patris, qui tenuit de uno domino, et ex parte matris quæ tenuit de alio domino (1), dubitatio hucusque extitit de maritagio hujusmodi minoris, ad quem de duobus dominis pertineat. Concordatum est, quod ille dominus de cætero habeat maritagiū (3), de quo antecessor suus prius fuit feoffatus, non habito respectu ad sexum, nec ad quantitatem tenementi, sed solummodo ad antiquius feoffamentum (4) per servitium militare.

IN case where inheritance descendeth to one within age of the father's side, that held of one lord, and the mother's side that held of another lord, there hath been hitherto doubt, for the marriage of such an heir, to which of the two lords it should belong; it is agreed, that the same lord shall from henceforth have the marriage of whom the child's ancestor was first infeoffed, not having respect to the sex, nor to the quantity of the land, but onely to the more ancient feoffment by knights service.

(44 Ed. 3. f. 15. Dyer, 11. 3 Ed. 3. f. 4. Bro. Gard. 114. 115, 116. Fitz. P. 23, 24. Fitz. Gard. 2. 3. 16. 19. 27. 36. 46. 55. 81. 86. 115. 134. 139. Stat. 12 Car. 2. c. 24.)

4 E. 3. receit 46.

Albeit this act putteth a case onely where one inheritance descends on the part of the father, and when another descends on the part of the mother, yet this statute extends to all cases of priority.

14 E. 3. gard 37.
8 H. 3. gard 139.

By these words in the act, [*non habito respectu ad sexum nec ad quantitatem*] the doubts at the common law are here mentioned: the first, that some did hold opinion that the part of the father being *digniori de sanguine*, the worthier blood should be preferred; others did hold opinion that if the lord of the land of the part of the mother, first happed or seised the ward, he should have it, and that *melior est conditio possidentis*.

Lastly, some did hold that the tenure by the greater quantity and value should be preferred: all which doubts are cleared by the purview of this act.

11 E. 2. c. 2.
21 E. 3. 41.
11 E. 3. 14rd.
Stattham. 5 E. 3.
4. 12 E. 3. Præ.
ro. 23. 24 E. 3.
31. 65. 18 E. 3.
29. 12 H. 4. 25.
14 H. 4. 9. 9 H.
4. 4. simile.

(1) *De uno domino, &c. de alio domino, &c.*] This act extendeth not to the king, because before the making of this act hee was to have the wardship of the body though the land were holden of him by posteriority; and so it is, if the king graunt that seigniory for life, the grauntee shall have the same benefit, in respect that the reversion remaine in the king: but if the king graunteth the fee-simple to another, there the lord by priority shall have the wardship, and the tenure by priority is revived, for the king had the wardship in respect of his person and prerogative.

(2) *Alicui minori descendat hereditas.*] This act is to be understood of a descent from one auncestor to one heire, and not from divers auncestors to one heire, nor from one auncestor to divers heires, nor from one auncestor to one heire at severall times.

24 E. 3. 26. 45.
15 E. 4. 14.
3 H. 7. 15.

As if a man seised in fee of the mannor of D. of the part of the father holden of A. by knights service, and of the mannor of S. of the part of the mother holden of B. by knights service, and dieth, his heire within age, this case (as by the letter thereof it appeareth) is within the scope and purview of this statute; for if the father holdeth land by knights service, and the mother hold land also by knights service, which of them die first, the lord of whom the land is holden, albeit there be but one heire to both, shall have the wardship of the body, which being once velled, shall not after be develled in respect of any priority, no though it were in the king's case.

Vet. N.E. 97. b.

The tenant maketh a feoffment in fee upon condition of the land holden by priority, and dieth seised of the land holden by posteriority his heire within age, the lord by posteriority seisseth the body, the condition is broken, the heire entreteth into the land holden by priority, the lord by posteriority shall retain the wardship, for seeing that both descended not at one time, it is out of this statute.

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44 E. 3. 15.

(3) *Habet maritagium.*] The lord by priority shall have the wardship of the body, for the lord by posteriority shall have the wardship of the land holden of him, as well as the lord by priority of the land holden of him, but the wardship of the body being intire, and which both cannot have, or right belongeth to the lord by priority by this act, and therefore if the lord by priority waive the wardship of the body, and refuse to take the same, yet the lord by posteriority cannot take advantage of it, for by this act the wardship of the body belongeth to the lord by priority and to no other.

(4) *Dē*

(4) *De quo antecessor suus fuerit feoffatus, habito respectu solummodo ad antiquius feoffamentum.*] Here it appeareth that the feoffment of the tenancy doth onely make the priority, and not the change of the feigniori. 14 E. 3. gard 37.

But where this statute speaketh of a feoffment, it is to be understood of any other assurance or conveyance of the tenancy.

Per antiquius feoffamentum, are not to be understood of the feoffment of the lord upon the creation of the feigniori, but of the feoffment made by the tenant of the land. 3 E. 3. gard 19.

To illustrate the meaning of this law by examples:

One holdeth Black acre of A. by knights service, and White acre of B. by knights service, anno 10 reg. Eliz. infeoffeth C. of Black acre, and 20 reg. Eliz. infeoffeth C. of White acre, who dieth his heire within age, B. shall have the wardship of the body, for C. had Black acre *per antiquius feoffamentum*.

So it is if the heire of C. die seised, and both acres had descended to his heire, he had holden Black acre by priority, that is *per antiquius feoffamentum* made to his auncestor, and so from heire to heire so long as both acres continue in that line by descent.

On the lords side the priority shall not onely continue as long as the feigniories continue in the lines of the lords, but also the change of the feigniori maketh no alteration, and therefore though the lord of whom Black acre is holden alien the feigniori, yet if he taketh it back to him again, Black acre shall be still holden of him by priority, the assignee of the lord by priority shall take advantage of it as well as the grantor.

But if the tenant had aliened Black acre to another, and acquired it backe againe, yet shall he hold it by posteriority, for now he holdeth White acre, *per antiquius feoffamentum*; so as the feoffment of the land (as hath been said) doth make the priority, and that feoffment must be understood of the immediate feoffment, but the priority of the land doth attend on the feigniori, into whose hands soever it commeth. Temps E. 1. gard. 134. F.N.B. 142. f. 13 E. 1. Cor. Rege Rot. 40. Eborum. 2 E. 2. gard. 2. 7 E. 3. 11. 34. 35. 13 E. 3. gard. 39. 13 E. 3. 29. b. 7 E. 3. 11. 6. 64. 11 E. 3. gard. 115. 14 E. 3. gard. 37. 33 E. 3. ibid. 12. F.N.B. 142. 13 E. 3. gard. 38.

If there be lord, mesne, and tenant, and the mesne hold by priority, the tenant in a writ of mesne doth forejudge the mesne; in this case the mesnalty is extinct, and the tenant shall be answerable to the lord, *de eisdem serviciis et consuetudinibus quæ prius facere debuit prædictus medius*; in this case the tenant shall hold by priority: for 1. he shall hold *per antiquius feoffamentum*; 2. The mesne in supposition of law was said to hold the land. 3. The statute of W. 2. that give the forejuder, provideth that he shall hold by the same services, and customes, and in such sort, as it may be done *sine prejudicio alterius*, and this should be to the prejudice of the lord by priority, if he should lose that benefit.

In a ravishment of ward the defendant pleaded that the father of the infant held the manor of D. of him the defendant by knights service, *et quod tenuit * manerium illud de ipso per antiquius feoffamentum, quam pater suus tenuit manerium de A. de modo querente*; and this was agreed to be a good plea without shewing of whose feoffment he held by priority, but generally, which is worthy of observation. 7 E. 3. 11. 34. 35. 21 E. 3. 11. 19. 4 E. 3. 37. 30 E. 3. 7. 13 E. 3. gard. 39. 30 E. 3. 7. * [393]

A. holds land of B. by priority, and other land of C. by posteriority, and infeoffeth D. of both: this case is out of this statute, because he commeth to both the lands at one time, so as he holds 8 E. 3. 57. 18 E. 3. 29. Ver. N. B. 97. F.N.B. 142. f. Bro. gard. 115.

not either of them *per antiquius seoffamentum, sed per unum et idem seoffamentum*; and therefore if he dieth, his heire within age, the lord which first seisseth the body in this case shall have it.

C A P. XVII.

IN itinere justic' (2) non admittatur de cætero essonium de malo lecti (1) de tenemento in eodem comitatu (3), nisi ille, qui se facit essoniari, veraciter sit infirmus, quia si excipiat a petente, quod tenens non est infirmus, nec in illo statu, quo minus venire potuit coram justiciariis, admittatur ejus calumnia. Et si hoc per inquisitionem contineri poterit, vertatur illud essonium in defaultam. Nec jaceat de cætero illud essonium in brevi de recto inter duos clamantes per eundem descensum (4).

IN the circuit of the justices an essoin de malo lecti shall not be from henceforth allowed for lands in the same shire, unless he that caused himself to be essoined be sick indeed; for if the demandant except, that the tenant is not sick, nor in such plight but that he may come before the justices, his exception shall be admitted. And if it can be so proved by enquest, the essoin shall be turned to a default. And from henceforth such essoin shall not lie in a writ of right between two claiming by one descent.

(Fitz. Essoin, 176. 186, 187, 188, 189, 190. 192, 193, 194. 196, 197. Regist. 3.)

See Marlb. c. 12.

We have before in generall spoken of the five kindes of essoines, but reserved to speak more particularly of this kinde of *essoin de malo lecti* in the exposition of this chapter, as in his proper place.

20 E. 3. essoin.
27.

(1) *De malo lecti.*] This essoin differeth from all other kindes of essoines, for this essoin lieth only *ad certum diem*, for he ought to appeare *ad primum diem*, &c. et *ad tertium diem* if *avera cest essoin*.

And in this case he shall have two essoiners, and the one shall cast the essoin, and the other shall sweare, that he saw the party sick, &c.

The mischief before this act was, that the adverse partie could not take issue, that he that offered to be essoined *de malo lecti* was in health, and not sick, and try it by a jury; but it was inquired by foure knights returned for that purpose by the sheriffe, *si fuer' languidus aut non*, and if they found that he was not *languidus*, then he should have fiftene dayes after to appeare, so as the party was delayed thereby fiftene dayes, and all the time before, and this was mischievous: for remedy whereof this act provideth, that the party shall take issue, that he is not *languidus*, which if it be so found it shall turne to a default; and if it be found that he is *languidus*, then he ought to have time to appeare a ycare and a day, and before he commeth out, he ought to have a writ *de licentia surgendi*, &c. as it appeareth by the authorities cited in the exposition of the said 12 chapter of Marlebridge.

5 H. 3. essoin.
186.

(2) *In itinere justic'.*] Although justices in eyre are here particularly mentioned, yet this act being a beneficall law to ouste delays

de'ayes is taken by equity, and doth extend to the court of common pleas.

1) * *De malo lecti*.] Sufficient hereof hath been spoken, onely this may be added that this effoine lieth not for an attourney, for no effoine shall be cast for an attourney but the common effoine onely.

(3) *De tenementis in eodem com'*.] This effoine *de malo lecti* doth onely lie in a writ of right right, and not in a writ of right in his nature.

15 H. 3. effoin
196.

(4) *Clamantes per eundem descensum*.] This effoine *de malo lecti* is wholly ousted in a writ of right between two claiming by the same descent.

15 H. 3. effoin
191, 192, 194-
20 E. 3. effoine
27.

As between two parceners either at the common law or by custom, &c. But if one coparcener claime the land by feoffement made by her auncester in fee, now if the other coparcener deforce her of this land in a writ of right brought against her sister, she may be effoined *de malo lecti*, and so between two brethren: so as this statute is intended where they claime the land *per eundem descensum*, and not where they derive their blood onely *per eundem descensum*; for in the case put before where they claime by severall titles, they may joyne the mise by graund assise, or by battell, which they cannot doe when they claim by one descent.

Braet. l. 2. fo. 66.
Britton, fo. 190.
13 E. 1. droit 51.
F.N.B. 10. a.

C A P. XVIII.

CUM debitum fuerit recuperatum (1), vel in curia regis recognitum (2), vel damna adjudicata, sit de cætero in electione illius (3) qui sequitur pro hujusmodi debito, aut damnis, sequi breve quod vicecom' fieri faciat (4) de terris et catallis debitoris, quod vicecom' liberet ei omnia catalla debitoris, (exceptis bobus et asinis caruæ) (5) et medietatem terræ sue (6), quousque debitum fuerit levatum (7) per rationabile præcium et extentum (8). Et si ejiciatur de illo tenemento, habeat recuperare per breve novæ disseisinæ, et postea per breve de redisseisinâ (9), si necesse fuerit.

WHEN debt is recovered or knowledged in the king's court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *fieri facias* unto the sheriff for to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor (saving onely his oxen and beasts of his plough) and the one half of his land, until the debt be levied upon a reasonable price or extent. And if he be put out of that tenement, he shall recover by a writ of novel disseisin, and after by a writ of redisseisin, if need be.

Fleta, li. 2. cap. 55. See the first part of the Institutes, sect. 504. ve:b. per Elegit. (Hob. 57. 3 Bullstr. 320. Dyer, 306. 373. 3 Rep. 12. 4 Rep. 65. 74. 5 Rep. 87, 88. 90. Fitz. Extent, 13. Fitz. Process, 51. Fitz. Execut. 35. 37. 41. 46. 66. 85, &c. Rast. 72. 327. Regist. 299. Cro. Car. 44. 2 Leon. 84. 88.)

Vile Mag. Char.
ca. 8. Dier 23
El. 305. b.

At the common law where a subject sued execution upon a judgement for debt or damages, he should not have the body of the defendant, or his land in execution (unlesse it were in speciall cases,) and the reason of the law was: that the body in case of debt should not be detained in prison, but be at liberty, not onely to follow his owne affaires and businesse, but also to serve the king and his country when need should require; nor to take away the possession of his lands in that case, for that would hinder the following of his husbandry and tillage, which is so beneficiall to the common wealth, whereof you may reade at large in sir William Herberts case.

Lib. 3. fo. 11, 12,
&c. Sir Will.
Herberts case.

[395]

But by the common law he should have execution in that case onely of his goods and chattels, and of his corne, and other present profit that grew upon his land, to which purpose the law gave him two severall writs to be sued within the yeare, one a *levari facias*, whereby the sheriffe was commaunded, *quod de terris et catallis ipsius A. levari fac'*, and the other called a *feri fac'*, which also was onely *de bonis et catallis*.

Now the common law being understood, let us peruse the words of the act.

(1) *Cum debitum fuerit recuperatum.*] That is, by judgement in an action of debt, or any action wherein damages are recovered.

(2) *Aut recognitum.*] That is, by recognisance knowledged in any court of record that hath power to receive the same.

If two do knowledge a recognisance of C. l. *quilibet eorum in solidum*, that is, joyntly and severally, the conusee may sue severall *seire fac'* against the conusors upon this recognisance.

A speciall recognisance may by expresse words binde the lands of the conusor in one county onely.

(3) *Sit in electione illius.*] This election shall the executors or administrators of the plaintife, or reconusee have, albeit they be not named; and so likewise shall the successor of the conusee have also: but the executors shall not have execution of the judgement or recognisance in the time of the testator, within the yeer, without suing a *seire facias*; but otherwise it is of a statute, &c.

When the plaintife or conusee prayeth an *elegit*, the entry is *quod elegit sibi executionem fieri de omnibus catallis, et medietate terræ*; and the writ of *elegit* is *ac cum idem H. juxta statutum inde editum* (meaning this statute) *elegerit sibi liberari pro prædict' 20. libris omnia catalla, et medietatem terræ ipsius R.* And therefore after the suing out of the *elegit*, the plaintife, that hath a judgement in an action of debt, cannot have a *capias*, &c.

(4) *Fieri facias.*] Here under these words is also the writ of *levari facias* included.

(5) *Vel quod vicecom' liberet ei omnia catalla, exceptis bobus et affris carucæ.*] The maior and aldermen of London take a recognisance of 250 pounds to the chamberlain of the city of London, and his successors according to the custome for orphanage money; in this case the chamberlain for the time being may sue out a precept in the nature of an *elegit* to a serjeant at mace, and minister of that court to do execution upon this act: and albeit the words of this statute are, *quod vicecomes liberet*; yet being a beneficiall law, by equity it is extended to every other immediate officer to every other court of record.

29 E. 3. 38, 39.
5 E. 3. 26. 35.
34 E. 3. Execu-
tion 129.
36 H. 6. 2, 3.
10 E. 3. 34, 35.
F.N.B. 267. c.
lib. 3. fol. 65.
Fulwoods case.
21 Aff. 15. 15 H.
7. 5. 20 E. 2.
Execution Sta-
tham. 2 R. 3. 8.
F.N.B. 267. b.
Regist. 299.
15 H. 7. 15.
21 H. 7. 19. 30.
E. 3. 24. 31 E. 3.
Proc. 52. 4. E.
3. 29. 50 E. 3. 4.
30 E. 3. Execu-
tion. Stattham.
22 Aff. 43. 17 E.
4. 4. b. 18 E. 4.
12. 34 H. 6. 20.
19 H. 6. 4.
3 lib. 3. fol. 65.
Fulwoods case.

^a If the chattels be sufficient to pay the debt, and so may appear to the sherife, whereby he may satisfie the debt, then he ought not to extend the land for the residue; and all this appeareth by the writ of *elegit* framed upon this act.

(6) *Et medietatem terræ suæ,*] ^b This is to be understood of the half of such land as the defendant had at the time of the judgement given, or of the recognisance knowledged, unless it be conveyed away by fraud and covin to deceive his creditors, contrary to the statutes in that case provided.

^c A man doth knowledge a recognisance of 100 pounds to be paid at five dayes; presently after the first day he may sue an *elegit* upon this act for 20 pounds, and have the moiety of the land delivered unto him and when the second day is past, he may have another *elegit* for that 20 pounds, and have the moiety of the remnant delivered to him, *et sic de cæteris*; for they be in effect in nature of severall judgements in law.

* And upon these words, *medietatem terræ suæ*, the sheriffe hath extended a term for yeers, and the like.

It is to be observed, that the generall words of this act doth not take away the priviledge which the law giveth to any person; and therefore no *elegit* upon this act shall be sued against the heir of the conusor during his minority.

Upon the equall construction of these words, if the conusor be seised of Black acre, White acre, and Green acre, and after the judgement given, or recognisance knowledged, infeofeth A. of White acre, and B. of Blackacre, and retains Green acre to himself, in this case he may have the moiety of Green acre, and never intermeddle with the rest: but he cannot extend the moiety of the acre in the hand of any purchaser, except he extend also the moiety of all the land subject to the judgement, or recognisance; and if he omit any, the extent shall be avoided in an *audita querela*: for where it is said in books, that each purchaser shall have contribution in that case, the meaning is, that such extent of part shall be avoided, and all the land extended and equally charged; and so it is if Green acre descend to an heir, the moiety thereof may be onely extended, without dealing with any of the rest: so likewise if there be two or more conusors, the lands of them all must be extended; and hereof you may read at large in sir William Herberts case, all which are just and righteous expofitions.

(7) *Quousque debitum fuer' levatum.*] The *elegit* framed upon these words, saith, *tenendum ut liberum tenementum, quousque debitum prædict' inde fuer' levatum*; and yet whensoever the party pay and satisfie the debt of record, he shall enter into his land: and so it is when the tenant by *elegit* is satisfied by the ordinary extent. the tenant of the land may enter. But if it be in respect of any casuall profit, to avoid the extent he must have a *scire fac'* in respect of the uncertainty.

(8) *Per rationabile precium et extentum.*] *Per rationabile precium* doth refer to goods and chattels, and *rationabile extentum* referreth to lands.

And hereby is implied, that this apprisement and extent upon the *elegit* must be found by enquest of 12 men, and so returned of record.

^a Regist. 299.

^b 19 E. 2. Execut. 249. 2 H. 4. 14. 42 E. 3. 11. 42 Aff. 17. 3 E. 3. Execut. 107. 10 E. 2. Execut. 137. 6 E. 3. 15. 17. 7 E. 3. 7. 8 E. 3. 15. 17. 17 E. 3. 15. 30 E. 3. 26. 50. 11 H. 4. 70. 9 H. 6. 58. ^c 16 E. 2. Execut. 138. 2 E. 2. ibid. 120. 16 E. 3. Fieri fac. 4. F.N.B. 267. b. Vide Mich. 31 E. 3. fo. 50. b. in libro meo per Fisher & Finchden.

* [396]

31 Aff. 6. 38 Aff. 4. li. 8. f. 171. Sir George Fletwoods case. 44 E. 3. 16. 7 H. 6. 2. 29 Aff. 37. 29 E. 3. 50. Sir William Herberts case, ubi supra.

29 Aff. 37. 29 E. 3. 50. Sir William Herberts case, ubi supra. 13 E. 3. Scire fac. 17. 21 E. 3. 36. 17 E. 3. 43. 46 Aff. tit. Scire fac. 47 E. 3. 11. 31 E. 3. Extent 31. Regist. 299. Fulwoods case, ubi supra.

Dier 2 Mar. 100. lib. 4. fol. 74. Palmers case.

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15 H. 7. 15. 9 H.
7. 9. 22 Aff. 44.
22 E. 3. 31.
44 E. 3. 10.
Temps R. 2. Pl.
ult. tit. Extent.
15 E. 3. Scire
fac. 115. 31 E. 3.
Extent 13. 15 E.
3. lib d. 17. 22
E. 3. Recovery
in value 22.
7 H. 4. 19. 22
R. 2. Execution
165. Dier 6 E. 6.
73. Regit. Ju-
dic. 13. 14. 20.
* 19 E. 2. Ex-
cut. 246.
28 Aff. p. 7.
F.N.B. 189. I.

That shall be said a reasonable extent, which is found by the oath of 12. men, and returned by the sherife, and filed, and there can be no re-extent granted upon surmise, that it is more then the half in value, or the like, because it extendeth onely to a chattell in lands: but before the extent be filed, the court may examine the cause, and if there be found fraud, deceit, or partiality, they may stay the filing of that writ, and grant a new.

But see 22 R. 2. 165. in dower, and in case of free-hold in Hil. 13 E. 2. fol. 74. b. the case of the hospitall of T. a *seire facias* granted for the surplussage upon a return in value, and delivered to the sherife by *habere fac' ad valorem*, for that it concerneth an inheritance, and so it was adjudged. Note the diversity, the tenant by *elegit* may for reasonable cause hold over the ordinary course of the extent, * by a reasonable construction upon this statute.

(9) *Per breve nove discessina, et per breve de redisseina, &c.*] The words of the writ of *elegit* (as hath been said) are, *tenendum ut liberum tenementum, &c.* because this statute giveth him remedy by assise, &c. but he hath but a chattell, and no freehold; and therefore it is said, *si ejiciatur*: and the writ saith similitudinary, *ut liberū tenement'*, in respect of the assise, &c.

This branch doth give the assise to the tenant by *elegit*, and yet his executors or administrators shall have it by the equity of this act; and so shall the executors or administrators of tenant by statute merchant, and tenant by statute staple.

I have seen a record of a judgement in the reign of E. 2. that the assignee of a tenant by *elegit* should not have an assise by the purview of this statute.

Tenant by statute merchant of lands, which the consor had in the right of his wife, brought an assise upon this statute, the tenant pleaded ancient demesne, &c. and so found, &c. and yet the plaintiff had judgement; and the reason of the judgement given in the record is this, *Licet manerium prædict' sit de antiquo dominico coronæ, et tenementa in eodem manerio existentia per parvum breve tantum placitabilia, et prædict' Ranulphus Huntingfeld in cognitione prædict' quam fecit præd' I. in statuto obligavit tenementa præd' in summa ejusdem cognitionis, quæ quidem obligatio naturam eorundem tenementorum non mutat, nec est ad præjudicium domini, aut exheredationem tenentium, ex quo tenementa illa per obligationem præd' solummodo onerata sicut ad certum tempus, post quod tempus reverti debent præd' Ranulpho et uxori suæ exonerata, tenenda ut prius, &c. Consideratum est, &c.*

By this judgement three things are to be observed; 1. that lands in ancient demesne may be + extended by the statute de *mercatoribus*, anno 13 E. 1. 2. That ancient demesne is * no plea in assise brought by tenant by statute merchant, upon this statute. 3. That in an assise of *novel disseisin* (which is *sestinum remedium*) ancient demesne shall be tried by the recognizers of the assise.

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Tr. 15 E. 2. coram Rege. Rot. 40. John Semers case.
Mich. 31 E. 1. coram Rege
Ebr. Ranulp. de Huntingfelds case.

† 7 H. 7. 1. H. 5. fol. 105. Aldens case.
* 22 Aff. 45. H. 5. ubi supra.
22 Aff. ubi supra.
8 Aff. p. 55. 9 Aff. 9. 12 Aff. 16. 2 E. 3. 40. b. 41 E. 3. 2. 40 E. 3. 23. 3 H. 6. 47.

C A P. XIX.

CUM post mortem alicujus decedentis intestati (1), et obligati (2) aliquibus in debito (3), bona deveniant ad ordinarium disponend' (4), obligetur de cætero ordinarius (5), ad respondendum de debitis quatenus bona defuncti sufficiunt. Eodem modo quo executores respondere tenerentur, si testamentum fecissent.

WHEREAS after the death of a person dying intestate, which is bounden to some other for debts the goods come to the ordinary to be disposed; the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.

(Dyer, 232. 5 Rep. 83. Fitz. Brief, 822. Fitz. Execut. 77.)

(1) *Decedentis intestati.*] There be divers kindes of intestates, one that make no will at all, another that make a will and executors, and they refuse; in this case he dyeth *quasi intestatus*, and these are within the purview of this act; therefore the ordinary is the person whom the law appointeth to have the charge or administration of the goods and chattels of the party that dyeth intestate, or *quasi intestatus*; and justly did the law in this case appoint the ordinary: for the law presumed, that he that had the care of his soul in his life time, would after his death have care of his temporall goods and chattels, to see them well disposed and administred.

Lib. 6. fol. 67.
Sir Moyle Finch's case.

And this act was made in assurance of the common law, as hereafter upon the exposition of some parts of the act shall appear.

17 T. 2. Br. 822.
24 E. 3. 55. 11 E.
3. Executors 77.
18 H. 6. 23. 9 E.
4. 33. 11 H. 7.
12. F.N.B. 120.
lib. 5. fol. 83.
Sneilings case.
Diet 8 Eliz. 247.

(2) *Et obligati.*] This is not onely intended of an obligation or deed in writing, but howsoever he was charged in law, as for rent upon a lease, or upon an *assumpsit*, or the like.

And after it is said in this chapter, *obligetur de cætero ordinarius*, where *obligetur* is not taken, that he should be bound in an obligation, but that he should be charged, or subject to an action.

(3) *In debito.*] This act is not onely intended of that which is properly a debt, but of all duties, covenants, or just causes of actions, such as might be brought against executors.

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(4) *Bona deveniant ad ordinarium disponend'.*] Unlessse some of the goods or chattels came to the hands and possession of the ordinary, he was not to be charged by the common law; but if they came to his hands, and he would neither administer and pay the debts and duties himself, nor commit them over to the kin and friends of the intestate that would, the common law did charge him, and so doth this act which is made in assurance of it.

If a man dye intestate, and a stranger taketh the goods, the ordinary shall not have an action of trespass for taking of them (unlessse he had taken them into his possession.) But the executor or administrator before seizure may have an action of trespass.

7 H. 4. 18.

Neither

31 E. 3. ca. 11.
 19 E. 3. Administ. 20. & 24.
 7 H. 4. 18. F. tit.
 Tresp. 97. 25 E.
 3. Exec. 105.
 11 H. 4. 71.
 18 H. 6. 22.
 F. N. B. 92. a.
 Pl. com. 278.
 241 E. 3. 2. 11
 H. 4. 72. lib. 5.
 fo. 82, 83.
 Snellings case.
 12 R. 2. Administ. 21.
 Lib. 5. fo. 29. the
 Princes case.
 9 Eliz. Dier 255,
 256. lib. fo.
 Sir Moyle Finches case.

17 E. 2. Br.
 322. 5 E. 2. ibid.
 16. 17 E. 3. 23.
 21 E. 3. 60. 41
 Aff. 29. 7 E. 4.
 14. 12 E. 4. 15.
 31 H. 6. 10.
 15 E. 3. quare non
 admitit 5. Dier
 18 Eliz. 350
 Regist. 67. Capitulum sede vacante succedit episcopo in ordinaria jurisdictione. And this is regularly true, unless it be by prescription or composition.
 Vide tit. 3. f. 73. the dean and chapter of Norwich case.
 4 Reg. 14. 1. 11
 R. 2. & 16 E. 4.
 Adj. 5. 11 L. 3.
 Execut. 177.
 24 E. 3. 54.
 11 H. 4. 72.
 F. N. B. 120.
 Pl. Com. 230.
 11 R. 2. Administ. 21.

Neither can the ordinary have any action of debt, covenant, or any other action which belonged to the intestate; but those to whom the ordinary commit administration may have all these actions by the statute of 31 E. 3. but before that statute, there was no remedy by law given to the administrators to recover those things in action.

^a But by the common law, an action of debt did lye against the administrators, but it was by the name of executors untill the said statute of 31 E. 3.

^b If the ordinary take goods of the intestate, being out of his diocese, he shall not be charged as ordinary by this act, because he taketh them of his own wrong, and not as ordinary, in which right he is to be charged by this act.

If it be demanded what interest the ordinary hath in the goods of the intestate, which come to his hands; it is answered, that he hath such an interest as the administrator, to whom administration is committed *durante minore etate executoris, ad opus, commodum, et utilitatem ipsius executoris, et non aliter, seu alio modo*. So as the ordinary may administer for the good of the intestate, but cannot give the goods of the intestate, or do any thing to his prejudice.

(5) *Obligetur de cetero ordinarius.*] *Ordinarius*; this word in the law of England, in the usuall and common sense signifieth a bishop, or he or they that have ordinary jurisdiction, and is derived *ab ordine*, to put him in minde of the duty of his place, and of that order and office that he is called unto; and this was the wisdom of antiquity, that names of men in great places should put them in minde (as often as they were named) of their duty: as the treasurer of England to have speciall care of the kings treasure; and they that had places in the kings principall courts of justice are called justices to put them in continuall memory to do justice, *et sic de ceteris*.

^c In this statute *ordinarius* is not onely taken for a bishop, but every one that is *in loco episcopi*; as gardeins of the spiritualties, and such as have peculiar and exempt ecclesiasticall jurisdiction, and be immediate officers to the kings courts of justice: and not onely an ordinary or gardein of the spiritualties, or others that be *in loco ordinarii*, that of right are within this act, but also such as usurp the place, and are in possession by wrong, are to be charged by this act.

^d If goods of the intestate come to the hands of the ordinary, and he dyeth; although the words be [*obligetur de cetero ordinarius*] yet his executors or administrators shall be charged in an action of debt; for when this act bindeth the ordinary, by consequent his executors or administrators are bound. But if the ordinary commit administration to one, and he taketh the goods into his possession and dyeth no action lyeth against his executors.

^e If the ordinary take goods into his hands of the intestate, and after commit administration, and the ordinary retaineth the goods, he shall be charged, notwithstanding the committing of administration.

CAP. XX.

CUM justiciarii in placito mortis antecessoris consueverint admittere responsum (1) tenentis, quod petens non est propinquior hæres (2) antecessoris, de cujus morte tenementum petitur, et hoc paratus est per assisam inquirere: concordatum est, quod in brevibus de consanguinitate, avo, et proavo, quæ sunt ejusdem naturæ, admittatur illa responsio, et inquiretur, et secundum illam inquisitionem ad iudicium procedatur.

WHEREAS that justices in a plea of mortdaunceſtor, have used to admit the answer of the tenant, that the plaintiff is not next heir of the same ancestor, by whose death he demanded the land, and is ready to enquire the same by assise; it is agreed, that in writs of cosinage, aiel, and besaiel, which be of the same nature, his answer shall be admitted and enquired, and according to the same inquisition they shall proceed to judgement.

Fleta, li. 5. ca. 8.

(1) *Consueverint admittere responſionem.*] Hereby it appeareth that admission and allowance of the justices ought to be holden for law, and so it is affirmed by this act.

(2) *Quod petens non est propinquior hæres.*] It is to be understood that the entry in an assise of mord' brought for (example) by P. against R. of 20 acres of land in S. is according to the words of the writ *assisa venit recognoscere si* ¹ *O. pater P. cujus hæres ipse est, fuit seſſitus in dominico suo ut de feodo de 20 acris terræ cum pertinentiis in S. die quo obiit. Et* ² *si obiit infra 30 annos jam ultime elapſos ante teſte brevis. Et* ³ *si P. propinquior hæres ejus ſit.*

These three points in this assise of mordaunc' shall be inquired of by the recognitors of the assise, albeit the tenant make default, and no issue be joyned thereupon: but so it is not in the writs of aiel, besaiel, or cosinage; for they are no assises but writs of *præcipe quod reddat*, and therefore if default be made therein, judgement shall be given by default, as in other writs of *præcipe quod reddat*, without inquiry of any point of the writ: the three points of the assise are hypothetically, the demandant affirming nothing, and the words of the other three writs here mentioned are categorical; *præcipe A. quod juste, &c. reddat B. unum messuagium, &c. de quo W. avus prædicti B. cujus hæres ipse est, fuit seſſitus in dominico suo ut de feodo die quo obiit*; now *quod petens non est propinquior hæres* is a deniall of one of the points of the writ of mordaunc'.

And it is to be understood that when the tenant pleadeth in barre of the assise, as matter of record, or a release, or warranty, or any other barre that is out of the said three points of the assise, there the tenant beginneth his plea with *assisa non, &c.* and therefore the triall of that issue is peremptory, and the assise shall never inquire of any of the points of the writ; but when the tenant saith, that he is ready to heare the recognisance of the assise, he cannot say *assisa non*, for that should be repugnant to his owne saying; and if hee say that he is ready to heare the recognisance of the assise of one of

31 E. 1. Mord.
53.

4 E. 2. Mord. 38.
8 E. 2. ibid. 41.
2 E. 3. 9. 9 E. 3.
30. 9 Aff. 3. 10
E. 3. 4. 45. 30 F.
3. 8. 2 Aff. 10.
8 Aff. 17. 14 E.
3 Mord. 8. 29
Aff. 1. 11. 39
Aff. 13. 40 E. 3.
48.
33 E. 3. Mord.
34. 2 H. 3. 14.

the

12 Aff. 48.

[400]

6 E. 3. 55.

Mirror, c. 5. § 5.

12 E. 3. Mord-
aunc' 10. 30 E. 3.
2. 33 E. 3.
Mord. 34.

the points of the writ, or traverse one of the points of the writ, yet the court *ex officio* ought to enquire of them all: and so it is if the tenant pleade in abatement of the writ, or vouch, and the demandant counterplead the voucher, and these pleas bee tried, or adjudged for the demandant, yet the points of the writs shall bee enquired, and ought to bee found for the demandant, or else he shall not recover.

Now the mischief before this statute was, that in the writs of aiel, besaiel, and cosnage, the tenant was not admitted to plead, that the demandant was not heire to him, upon whose dying seised the writ was conceived, but he must shew who was his next heire, which now by this act he need not to doe, but yet he may plead the like plea, as he might have done at the common law as he did in 6 E. 3.

But heare what the Mirror speaking of this act saith, *Le statut de allower un manner de exception in semblable actions ne fuit my mistier daver estre ordein sinon par negligence des justices, car chesteun affirmative est encounterable de son negative al peril del deliverant.*

If the tenant saith, that he is ready to heare the recognisance of the assise, he cannot give in evidence that the demandant is a bastard, but he ought to have pleaded the same.

(3) *Antecessoris.*] This *antecessor* in a writ of mordaunc' is intended of the father, mother, brother, sister, uncle, aunt, nephew, or niece of the demandant, and of no other.

(4) *Quæ sunt ejusdem naturæ.*] The difference betweene the assise of mordaunc', and these three præcipes appeareth by that which hath been said, and yet in some respect the words of this act that they be *ejusdem naturæ* are true.

For as the writ of mordaunc' saith, *Si O. pater P. cujus hæres ipse est, fuit seistus in dominico suo ut de feodo de 20 acris terræ cum pertinen' in S. die quo obiit.* So the words of the writ aiel be, *De quibus N. avus prædict' P. cujus hæres ipse est, fuit seistus in dominico suo ut de feodo die quo obiit, &c.*

(5) *Et secundū illiam inquisitionem ad judicium procedatur.*] Herein is the difference between this plea in assise of mordaunc', and the other writs; for in the assise of mordaunc' the rest of the points of the writ, as hath been said, shall be enquired.

But in the writs of aiel, besaiel, and cosnage, the triall of this issue is peremptory, and thereupon the court shall proceed to judgement as here is expressed.

C A P. XXI.

CUM in statuto edito apud Glouc' (1) *contineatur, quod si quis dimiserit terram alicui ad reddend' valoris quartæ partis ten' vel majoris, habeat ille qui dimisit, vel ejus hæres (postquam cessatum fuerit a solutione per biennium) actionem petendi ten' sic dimissam in dominico. Eodem modo*
concor-

WHEREAS in a statute made at Gloucester, cap. 4. it is contained, that if any lease his land to another to pay the value of the fourth part of the land, or more, the lessor, or his heir, after the payment hath ceased by two years, shall have an action to demand the land so leased in demean.
In

concordatum est (2), *quod si quis detineat* (3) *domino suo* (4) *servitium debitum et consuetum per biennium, habeat dominus actionem petendi ten' in dominico* (5) *per tale breve.*

In like manner it is agreed, that if any withhold from his lord his due and accustomed service by two years, the lord shall have an action to demand the land in demean by such a writ.

Præcipe A. quod iuste, &c. (6) *reddat B. tale ten', quod A. de eo tenuit per tale servitium, et quid ad præd' B. reverti debeat, eo quod prædictus A. in faciend' prædictum servitium * per biennium cessavit ut dicit.*

Et non solum in isto casu, sed in casu de quo fit mentio in prædicto statuto Glouc' fiant brevía de ingressu hæredi (7) *petenti super hæredem tenentem, et super eos quibus alienat' fuerit hujusmodi tenementum.*

And not onely in this case, but also in the case whereof mention is made in the said statute of Gloucester, writs of entry shall be made for the heir of the demandant against the heir of the tenant, and against them to whom such lands shall be aliened.

*[401]

Glouc', cap. 4. (6 Ed. 1. stat. 1. c. 4. Fitz. Brief, 249. 269. 6 H. 7. f. 7. Fitz. Cessavit. 1, 2, 3, 4, 7, 8. 17. 21. 22. 32. 33, 34, 35, 45, 46. 50, 51. 54. 8 Rep. 113. Fitz. Cessavit, 42. 1 Inst. 154. Regist. 237.)

(1) *Cum in statuto edito apud Gloucest', &c.*] The statute of Glouc' is misrecited for [*et ejus hæres*] are not in that statute.

1. Hereby it appeareth that the statute of Glouc' extended onely, when upon the creation of the tenure a fee farme was reserved, the deteinment whereof was more prejudice to the lord then common and usuall rents and services, and therefore that act was not extended by equity to other rents, or services.

2. That albeit the statute of Glouc' mentioneth a deed, yet if the fee farme be reserved without deed, that act extended to it, for here in the recitall of the act no deed is mentioned, so as that statute is extended to all fee farmes.

3. Here it is said *eodem modo concordatum est, quod si quis detineat domino suo servitium debitum et consuetum*; and if the statute of Glouc' had not extended to fee farmes without deed, then should not a *cessavit* lie for other services upon this act, unlesse they had been reserved by deed, by reason of these words, *eodem modo, &c.*

(2) *Eodem modo concordatum est, &c.*] By these words this act is so incorporated into the statute of Glouc'; as the letting of the land to lie fresh, the tender of the arrerages, finding of surety, &c. are to be applied to this act concerning other services.

(3) *Si quis detineat.*] These words extend as well to bodies politique or incorporate, either sole or aggregate of many, as to naturall persons; also to feme coverts and infants, unlesse the infant have the land by descent, and then although the cesser be in his time, he shall have his age, for that by intendment of law he knows not what arrerages to tender.

If a villein seile and the lord enter, no *cessavit* shall lie against the lord for the cesser by the villein.

(4) *Domino suo.*] This is not intended onely of a lord that hath an estate in fee-simple in a feignory, but of such also that have an estate taile, or any state for life derived out of a fee-simple; but he

3 E. 3. 26.

4 E. 2. Cui in vita 22. f. 3. fo. 43. Wittinghams case. f. 9. f. 85. Lomas case. 34 E. 3. bre. 924.

32 E. 1. cessavit. 20. 31 E. 2. cessavit. 17 f. 2. 1b d. 51. 8 H. 3. reccit. 36. 43 E.

3. 15. 45 E. 3.
27. 33 H. 6. 53.
9 H. 7. 16.
F.N.B. 209.
Vet. N.B. 78.

in the reversion shall not have a *cessavit* against the donee in taile or tenant for life, for he in the reversion is not *dominus* within this statute.

If the tenant cease by one year, and the lord graunt over his feignory, and then the tenant cease another year, neither of them is *dominus* within this act. Lib. 2. fol. 93. Bingham's case.

See the exposition upon the statute of Glouc' cap. 4. what services are intended within this statute, *viz.* services annuall, as rent, suit, and the like, and not hontage; or sealty, or the like, for this act saith *per biennium*, which implieth annuall services. But this act extendeth not to rent service created upon a fee farme, but a *cessavit* upon a fee farme must be conceived upon the statute of Gloucester, for which purpose there be severall writs in the Register.

R^{eg}ist. 237.

[402]

14 E. 2. bre. 815.
14 E. 3. ibid.
269. 19 E. 3.
ibid. 249. 21 E.
3. 44. 30 E. 3.
22. 28 E. 3. 95.
48 E. 3. 4. 27 E.
3. 27. 39 E. 3.
15. 12 R. 2.
cessavit 460.
33 H. 6. 53.
12 E. 4. 10. ult.
27 H. 8. 28.
Kelwey 104,
105. 13 E. 3.
gard 38. 1 H. 4.
5. per Burgh.
Lib. 8. fol. 86.
Buckmers case.
21 E. 3. 44. b.
&c. Regist. 237.
Vet. N.B. 78.
138, 139.
F.N.B. 208.

(5) *In dominico.*] It was the wisdom of auncient parliaments to comprehend much matter in few words, as in this case, if the tenant made a lease for life, or a gift in taile, and a cesser was by two yeares, in this case a *cessavit* should be brought against the tenant for life or in taile, and suppose that he in reversion did hold of him, and that the tenant for life, or in taile did cease: and so if the tenant was disseised, and the disseisor ceased, the writ of *cessavit* should suppose that the disseisee did hold, and that the disseisor did cease: and likewise if the tenant by whose hands the lord was seised of his service made a feoffment in fee, the writ of *cessavit* should suppose that the feoffee ceased, and that the feoffor did hold of him, *et sic de similibus*: and the reason of these and the like cases was, for that the lord by his *cessavit* was to recover the land in *dominico*; and therefore these writs were framed and allowed accordingly: and for the same reason, if there be lord mesne and tenant, and the tenant peravaille cease by two yeares; the lord shall have a *cessavit* against the tenant (for a *cessavit* doth not lie of a rent) and suppose that the mesne ceased.

(6) *Præcipe A. quod juste, &c.*] Here is the writ of *cessavit* framed; now the great objection upon that which hath been said, how the cesser can be alledged in the tenant, against whom the *præcipe* is brought, and the tenure alledged in another, when the writ so formed doth suppose him, against whom the *cessavit* is brought, to hold also of the demandant: the answer is, that the writ formed by this act is put but for example, and seeing that, if such writs, as are above said, should not be maintained, no *cessavit* should be maintainable at all in those cases, therefore they have been adjudged to be good.

R^{eg}ist. 237.

Here is a writ in a new case framed by this act, and therefore the act is not to be recited, (as often we have observed before) but the forme prescribed is to bee pursued; but in a *cessavit* upon the statute of Glouc', the statute is rehearsed, because there is no forme of writ prescribed by that act.

(7) *Fiant brevias de ingressu hæredi.*] A *cessavit* is properly called *brevias de ingressu*, when it is in the *per*, or in the *per et cui*.

63 E. 3. cessav.
42. Pl. Com.
110. F.N.B.
209. f. lib. 8.
10. 118. D. Bon-
hams case.

Certain it is that the heire shall not have a *cessavit* for a cesser in the life time of the auncester, because the heire cannot have the arrearages which the tenant in the *cessavit* hath power to tender, and therefore this act is to bee intended of a cesser in the time of the

the heire, otherwise the act should be contrary to itselfe, which in all expositions is to bee avoided.

And so it is of the aunt and neece, they shall not joyne for a cesser in the time of the mother of the neece, but for a cesser in the time of both of them the *cessavit* doth lie.

33 E. 3. ubi supra. F.N.B. ubi supra.

Se the statute of 10 E. 1. *statutum de gamletto in London, Vet. Magna Charta fol. 122.* where it is said, *implacitentur de gamletto*, which is a kinde of *cessavit*, for *gamel* or *gabbe*, or *gabel* in one of the senses is taken for *cessus*, rent, &c. and *gamelletum* is as much to say, as to cease, or let to pay the rent, *breve de gamelletto in London est breve de cessavit in biennium, &c. pro redditu ibidem, quia teneamenta fuerunt inaisstringibilia.*

Fleta, l. 2. ca. 48.

Coram Rege Pasch. 17 E. 3. Rot. 139. London.

C A P. XXII.

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CUM duo vel plures teneant *boscum* (1), *turbariam*, *piscariam*, vel alia hujusmodi in communi (2), absq; hoc quod aliquis sciat suum sepe-rale, et aliquis eorum faciat *vastum* (3) contra voluntatem alterius: moveatur actio per breve de *vasto*. Et habeat defendens, cum ad iudicium venerit, electionem (4) capiendi partem suam in certo loco per *vid'*, et per *visum*, et *sacram'*, ac assignationem vicinorum ad hoc elect' et juratorum: vel quod concedat (5) quod nihil capiat de cetero in hujusmodi in *bosco*, *turbaria*, et aliis, nisi secund' quod participes sui capere voluerint. Et si eligat capere partem suam in certo loco, assignetur ei locus *vastatus* (6) in suam partem, secundum quod fuit antequam *vastum* fecit. Et est tale breve in hoc casu: scil. cum A. et B. teneant *boscum* pro indiviso, B. fecit *vastum*, &c.

WHEREAS two or more do hold wood, turf-land, or fishing, or other such thing in common, wherein none knoweth his several, and some of them do waste against the minds of the other, an action may lie by a writ of waste; and when it is come unto judgement, the defendant shall choose either to take his part in a place certain, by the sheriff, and by the view, oath, and assignment of his neighbours sworn and tried for the same intent, or else he shall grant to take nothing from henceforth in the same wood, turf-land, and such other, but as his partners will take. And if he do choose to take his part in a place certain, the part wasted shall be assigned for his part, as it was before he committed the waste. And there is such a writ in this case, that is to say, *cum A. & B. tenent boscum pro indiviso, B. fecit vastum, &c.*

Fleta, li. 1. ca. 11. See the first part of the Institutes, 323. (21 Ed. 3. f. 29. Fitz. Waste, 25, 96. 1 Inst. 200. Regist. 76.)

(1) *Boscum*, &c.] This act extendeth not to castles, houses, or other places for the habitation of man, for one joyntenant, or tenant in common might have had for reparation of them a writ *de reparatione faciend'*.

Regist. 76. 23. H. 7. Kew. 98. F.N.B. 127. 2.

(2) *Teneant, &c. in communi*, &c.] These words do include aswell joyntenants as tenants in common, for both of them hold *in communi*, and so do old books and records term them both: but though the generality of these words do extend to coparceners, yet in good

27 H. 8 13. 21 E. 3. 29. 29 E. 3. 39.

II. INST.

3 B

construction

construction they are not within the purview of this act, because they were compellable to make partition; for this act extends not to them that had remedy by the common law, as hath been said before.

This word [*teneant*] doth imply a free-hold at least.

F.N.B. 49. 59. d.

21 E. 3. 29.

3 E. 2. Waste 25.

A parson of a church being tenant in common with another shall have an action of waste upon this statute; and it is holden, that an action of waste upon this act is maintainable between joyntenants, or tenants in common for lives, and yet the words of the writ be, *ad exheredationem*.

50 E. 3. 3.

If woods be given to two, and the heirs of one of them, he that hath the fee shall have an action of waste upon this statute, for no other action of waste he can have.

But if woods be letten to two, the one for life, and the other for yeers, they are not within this statute, in respect of the said word *teneant*.

(3) *Faciat vastum.*] What shall be said waste or destruction in a tenant for life, &c. shall be said waste within this act.

Habeat defensens, cum ad judic' venerit, electionem, &c.] Here the defendant hath election, either to have his part in certain, and to take the place wasted as part thereof, or that he findeth surety to take no more then belongs to his part.

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31 H. 8. cap. 1.

32 H. 8. cap. 32.

And the defendant hath at this day a further election, either to have an action of waste upon this act, or a writ of partition by the late statutes.

(4) *Concedat.*] That is expounded, that he finde such convenient surety, as the court shall allow of.

(5) *Assignetur eis locus vastatus.*] This is not literally to be taken, for it may be, that the place wasted is more than his portion, therefore it must be understood of so much as belong to his part.

C A P. XXIII.

HABEANT de cætero executores
(1) *breve de compoto, et eandem actionem, et processum* (2) *per illud breve, quale habuit mortuus, et haberet si vixisset.*

EXECUTORS from henceforth shall have a writ of accompt, and the same action and process in the same writ as the testator might have had if he had lived.

(Fitz. Executors, 97. 4 Ed. 3. c. 7. 25 Ed. 3. stat. 5. c. 5.)

7 E. 3. 62. 19 E.

3. Account 56.

Hil. 31 E. 3. fo.

30. in libro meo

in Account.

F.N.B. 117. b.

38 E. 3. 7.

31 E. 3.

Account 57.

By the common law executors should not have an action of account for an account to be made to the testator, because the account rested in privacy: for remedy whereof this act was made; but *per legem mercatoriam* an action of account did lye for executors. The successor of a prior, or the like should have an action of account for an account to be made to the predecessor, because the house never dyeth.

(1) *Executores.*]

(1) *Executores.*] Administrators had no action untill the statute of 31 E. 3. No action of account was given to the executors of executors till the statute of 25 E. 3. But this act of 25 E. 3. as to the action of debt, covenant, &c. therein mentioned, is but in affirmance of the common law.

(2) *Eandē actionē et processum.*] The heir in socage dyeth before the age of 14, his executors or administrators shall have an action of account presently, and yet the heir himself should not have an action before 14, but the statute saith, *eandem actionem*, and not *ad idem tempus*.

C A P. XXIV.

IN casibus in quibus conceditur breve de cancellaria de facto alicujus, de cetero non recedant querentes a cur' (2) regis sine remedio (1), pro eo quod tenement' transfertur (3) de uno in alium. Et in registro de cancellaria (4) non est inventum aliquod breve in isto casu speciale, sicuti de muro, domo, mercato (5), conceditur breve super eum qui levavit ad nocumentum (6). Et si transferatur domus, murus, et his similia in aliam personam, breve non denegat' : sed de cetero cum in uno casu conceditur breve, in consimili casu simili remedio indigente, sicuti prius, fiat breve (7). Questus est nobis A. quod B. injuste, &c. levavit domum, murum, mercatum, et alia que sunt ad nocumentum liberi tenement' sui. Et si hujusmodi levata ad nocumentum transferantur in aliam personam, de cetero fiat breve sic : questus est nobis A. quod B. et C. levaverunt, &c. Eodem modo sicut persona (8) alicujus ecclesie (9) recuperare potest communiam pastur' per breve nove disseisine. Eodem modo de cetero recuperet successor super disseisitorē, vel ejus hæredem per breve, quod permittat, licet hujusmodi breve prius in cancellaria non fuerit concessum. Eodem modo sicut conceditur breve utrum aliquod tenem' sit libera elemosina alicujus ecclesie, vel laicum feudum, tale fiat de cetero breve utrum (10) sit libera elemosina

IN cases whereas a writ is granted out of the chancery for the fact of another, the plaintiffs from henceforth shall not depart from the king's court without remedy, because the land is transferred from one to another. And in the register of the chancery there is no special writ found in this case, as of a house, a wall, a market, but the writ is granted against him that levied the nuisance. And if the house, wall, or such like be aliened to another, the writ shall not be denied; but from henceforth, where in one case a writ is granted, in like case, when like remedy falleth, the writ shall be made as hath been used before: *questus est nobis A. quod D. injuste, &c. levavit domum, murum, mercatum, et alia que sunt ad nocumentum, &c.* And if such things levied be aliened from one to another, the writ shall be thus: *questus est nobis A. quod B. et C. levaverunt, &c.* In like manner as a person of a church may recover common of pasture by writ of *novel disseisin*, likewise from henceforth his successor shall have a *quod permittat* against the disseisor or his heir, though a like writ were never granted out of the chancery before. And in like manner as a writ is granted to try whether land be the free alms of such a church, or the lay fee of such a man, even so from henceforth a writ shall be made to try whether it be the

talēs ecclesiæ, vel alterius ecclesiæ, in casu quō libera elemosina unius ecclesiæ transferatur in p̄ssimam alterius ecclesiæ. Et quōviscunque de cætero evenierit (11) in cancellar', quod in uno casu reperitur breve, et in consimili casu (12) cadente sub eodem jure, et simili indigente remedio non reperitur: concordent clerici (13) de cancellaria in brevi faciendo, vel atterminent querentes in proximum parliamentum: et scribantur casus, in quibus concordare non possunt, et referant eos ad proximum parliamentum (14): et de consensu jurisperitorum fiat breve, ne contingat de cætero quod curia domini regis deficiat (15) conquerentibus in justitia perquirenda.

free alms of this church, or of another church, in case where the free alms of one church is transferred to the possession of another church. And whenever from henceforth it shall fortune in the chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ; or the plaintiffs may adjourn it until the next parliament, and let the cases be written in which they cannot agree, and let them refer themselves until the next parliament, by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants.

[Rast. 405. Rast. 441. 6 R. 2. c. 3. 9 Rep. 55. Rast. 538. Registr. 32. Rast. 419. Coke pla. 399. 14 Ed. 3. 27. Rast. 123. Fitz. Entry, 3. 7, 8. 10. 61. 64. 67, 68, 69, 74. 1 Inst. 54. b.)

4 Aff. 3.
4 E. 3. 36.
5 E. 3. 43. li. 5.
fol. 101. Pen-
raddocks case.

Before the making of this act, an assise of nufans did not lye against him that levied the nufans, and against his alienee; so as by the alienation of the wrong doer, the assise of nufans failed: and he, to whom the nufans was done, was driven to his *quod permittat* (which was a writ of right in his nature, wherein was great delay) against the alienee; and the reason thereof was, for that there was no writ of assise of nufans in the Register, but that supposed that the tenant in the assise *levavit*, which is remedied by this act.

(1) *De cætero non recedant querentes a curia regis sine remedio.*] This is an ancient maxime of the common law, and the reason thereof is, *ne curia regis deficeret in justitia exhibenda*, so as in one court or other the party injured should have justice.

(2) *A curia, &c.*] The makers of this act knew well, that the party injured by the nufans, albeit the wrong doer made it in his own ground, yet might the party grieved (albeit he had but an estate for yeers) enter and abate, and demolish the nufans, be it house, wall, or other nufans, not onely when it was in the hands of the wrong doer, but in the hands of the alienee: but this act doth give the tenant of the free hold as speedy a remedy by law, as is the assise of *novel disseisin*, which was ever counted *sestinum remedium*; and yet if the wrong doer reform the nufans before the assise, or *quod permittat* brought, the action lyeth not; howbeit, if the party had any particular losse by the nufans, he shall recover damages therefore in an action upon the case, *ne querentes recederent a curia sine remedio*.

(3) *Ten.mentum transfertur.*] *Transfertur* is a more general word then *alienetur*, for *alienare* is regularly intended of the act of the

Bract. 1. 4. fo.
231. 6 E. 2. Aff.
454. Fleta, li. 4.
c. 7. 9 E. 4. 35.
F. N. B. 184. g.
li. 5. fol. 181.
Pearud. cate.

the party, but *transfere* comprehendeth also acts in law, as descents, escheats, and the like: and therefore if two coparceners levie a nufans upon their ground, and one dye, so as her part descend to her heir, the assise of nufans is maintainable against the aunt as a wrong doer, and the neece as a tenant of a moiety, which moiety is transferred, but not aliened to her, and so if the alienee dye seised.

(4) *In registro de cancellaria.*] This is a book of great antiquity and authority in law, whereof in another place I have spoken.

(5) *De mercato.*] Here it is to be observed, that if one hath a market, either by prescription, or by letters patents of the king, and another obtains a market to the nufans of the former market, he shall not tarry till he have avoided the letters patents of the latter market by course of law, but he may have an assise of nufans.

Note there be words in the grant of a market, *ita quod non fit ad nocumentum alterius mercati.*

And note that fairs are taken within this law, for every fair is a market, but every market is not a fair.

* Now in what cases a fair or market shall be said to be levied to the nufans of another, you may read in our old and latter books, this onely that hath been said is sufficient touching this point, for the understanding of this act.

(6) *Levavit ad nocumentum, &c.*] ^b A grant of a fair, &c. *Nisi sit ad nocumentum feriarum vicinarum*, where *ad nocumentum feriarum* is put but for example; for if it be *ad aliquod damnum*, either of the king, or subject in any other thing, the fair shall be revoked.

^c *Nocumentum est triplex*; 1. *publicum sive generale.* 2. *Commune.* 3. *Privatum sive speciale.*

Publicum, *ad nocumentum totius regni*; *commune*, *ad commune nocumentum transeuntium*; *privatum*, to a house, a mill, &c.

^d It is true that a private nufans may be committed three manner of wayes; *viz. Faciendo, non faciendo, permittendo, et non permittendo.*

^e By this word *levavit*, and these words in the beginning of the chapter, *de facto alicujus*, it appeareth that this act onely extendeth to nufances that are committed by doing or disturbing; for, for not doing no assise of nufans lyeth, but an action upon the case.

^f Though the word *levavit* is onely here, and in the writ (herein mentioned) used, yet *exaltavit*, *deexaltavit*, *obstruxit*, *obstupavit*, *arcavit*, *divertit*, &c. nay *prostravit*, which is the opposite to *levavit*, &c. are within this act.

(7) *Cum in uno casu conceditur breve, in consimili casu simili remedio indigere, sicuti prius, fiat breve.*] See hereafter in this chapter concerning this rule.

(8) *Eodem modo sicuti persona, &c.*] ^g A parson of a church shall have a *quod permittat* of a common in the right, and also in nature of a mordant, &c. because the parson had an inheritance in the common in the right of his church.

But of a nufans done in the time of the predecessor against the disseisor or his heire, being an injury and wrong, no *quod permittat* shal lie in that case before this statute, as it plainly appeareth by this

1. Part of the Institutes, sect. 201. 234. Preface to the 3. book of my Reports

* Bract. li. 4. fo. 235. Brit. li. 159. Flet. li. 4. c. 28. 13 H. 4. 5. 6. 47. 22 H. 6. 16.

^b Pasch. 32 E. 1. Coram Rege, the Prior of Tyne-mouths case. Northumber.

^c Fleta, l. 4. c. 27. Glanv. l. 9. c. 11. li. 13. ca. 34. 19 E. 3.

Barre 179. ^d Glanv. l. 13. c. 34. &c. Bract. li. 4. fo. 231, &c. Fleta, l. 4. c. 18. 23. 26, &c. Brit. fo. 71. 2 H. 4. 11.

11 H. 2. 83. 29 E. 3. 32. ^e Temps E. 1. Aff. 422. 7 E. 3. 56. 8 E. 3. 21.

8 Aff. 32 Aff. 2. 42 Aff. 15. 18 E. 3. 32. 18 E. 2. tit. Aff. 395.

5 H. 3. ibid. 426. 3 E. 1. ibid. 445. F.N.B. 183, 184. Regit. 452.

9 Aff. 19. 48 E. 3. 27. 8 13 E. 1. Juris utrum 15. 30 E. 1.

1. Quod permittat 10. 32 E. 1. ibid. 14. & tit. Common 24.

31 E. 1. B. 874. tit. Quod permittat 8. 4 E. 3. 38. 43 E. 3. 25. 1 H. 4. 5.

F.N.B. 49. c.

[407]

act it selfe, and the reason was, for that there was no writ in the Register in that case.

Regist. 32, 33.

(9) *Persona alicujus ecclesiæ.*] These words doe include vicars, prebendaries, &c. and all other ecclesiasticall persons which could not have a *quod permittat* in the like case before the making of this act; for private persons, though they had but an estate taile they might have had a *quod permittat*, and therefore no provision was made for them, but onely for parsons of a church, and the like.

Glan. l. 13. c. 23.
Bract. l. 5. f. 286.
Brit. fol. 234.
55. 65.

Fleta, l. 5. c. 19.
& 26. 11 E. 3.

Juris utrum. 3.
First part of the
Instit. sect. 646.
Custumier de
Norm. ca. 115.

20 E. 3. Juris
utrum 3. 19 H. 3.
ibidem 16.

8 E. 3. 60. 5 E. 3.
Juris utrum 9.
19 R. 2. ibid. 17.

Bract. l. 5. f. 413.
Fleta, l. 2. ca. 12.

Lib. 8. f. 48, 49.
John Webs case.

First part Instit.
sect. 67.

(10) *Breve utrum.*] A *juris utrum* did lie at the common law for a parson against a lay man, and for a lay man against a parson, but no *juris utrum* did lie for one parson against another before this act, because it was the right of a church and no lay fee. And the words of the writ at the common law were *an sit laicum feodum, &c.*

If an abbot hath a parsonage appropriated to him, and aliens the glebe of the parsonage, his successor shall have a *juris utrum*, which he hath as parson, and not as abbot.

A parson or chaplain of a chappel, which comes in by admission and institution, shall have a *juris utrum*, because he hath no other remedy; otherwise it is of a gardein of an hospitall, a prior, and the like, because they may have a writ of right.

(11) *Et quocunque evenerit.*] This is a most excellent and necessary rule, for before this act the justices did punctually hold themselves to the writs in the Register, because they could not change them without act of parliament; (as elsewhere hath been said) therefore by this generall law it is notably provided for expedition and administration of justice, that as often as it should happen in the chauncery, that in one case there is writ (in the register of the chauncery) found, and in like case happening under the same right, and needing the like remedy, a writ is not found, let the clerks of the chauncery agree in making of a writ, or adjourne the plaintiffe untill the next parliament, &c. But now let us peruse the words.

31 E. 1. bre. 874.
38 E. 3. 13.

(12) *Consimili casu.*] Although there be a speciall writ grounded upon this statute, called by the particular name of a writ in *consimili casu*, yet many other writs (though they beare not the name) are grounded upon this act, as it appeareth in our books.

First part of the
Instit. sect. 67.

(13) *Concordent clerici.*] And albeit that we have treated of this in another place, yet for the understanding of these words, somewhat shall here be said.

Lib. 8. f. 48, 49.
John Webs case.
Fleta, l. 2. ca. 12.
21 E. 3. fol. 38.

These that here are called *clerici*, were at this time, and before called also *magistri cancellariæ*, and were associated to the lord chancellor; of whom Fleta saith, *Cui associantur clerici honesti et circumspetti, domino regi jurati, qui in legibus et consuetudinibus Anglicanis notitiam habeant pleniorcm, quorum officium sit supplicationes, et querelas conquirentium audire et examinare, et eis super qualitatibus injuriarum ostensarum debitum remedium exhibere per brevia regis.*

Li. 8. ubi supra.

And these writs agreed upon by these master clerks were called *magistralia*, for distinction sake, between *brevia formata de cursu*, and these called *magistralia*, but hereof more hath been said in another place.

3 E. 2. Entry 8.
F.N.B. 206. f.

And one speciall note is to be taken, that this generall law extends not onely to writs at the common law, but to writs also grounded upon acts of parliament: for example, the statute of

Gloucester

Gloucester doth give a writ of entry in case of alienation by tenant in dower, to be brought in the life of tenant in * dower, which thereupon is called a writ of entry *in casu proviso*: now upon these generall words writs have been framed in *consimili casu*, that is, where tenant by the curtesie, or tenant for life doe alien, but it must be in *consimili casu* with the statute of Gloucester; for where that statute speaketh of a reversion, a remainder is not in *consimili casu*, as some doe hold, that a reversion *ex assignatione*, though it be but for life, is within the act.

(14) *Atterminent querentes usq; in proximum parlamentum.*] Matters of great difficulty were in auncient time usually adjourned into parliament to be resolved and decided there, whereof Bracton saith, *Si aliqua nova et inconsumeta emergerint, quæ nunquam prius evenerunt, et obscurum, et difficile sit eorum iudicium, tunc ponantur iudicia in respectu usque ad magnam curiam, ut ibi per consilium curiæ terminetur*: and this agreeth with our books from time to time.

And hereof there be infinite precedents in the rols of parliament. *Vide* the statute of 14 E. 3. cap. 5. see 22 E. 3. 3. & 2 H. 7. 19.

To which end parliaments were often holden, * king Alfred or Alured did ordain by authority of parliament, that for ever twice a yeare, or oftner, if need were, in time of peace a parliament should be holden at London: *pur parlementer sur le guidentment del peple de Dieu, coment gens se garderont de pecber, vivront in quiet, receivront droit per certain usages, et saints judgements*, of whom the poet sung,

*Anglorum sic regna regens, ut non foret illi
Antea rex similis, æqualis postea nullus.*

And in an ancient chronicle I reade of him, *Aluredus acerrimi ingenii princeps et doctissimus totumque novum et vetus testamentum in eulogiam Anglicæ gentis transmutavit, &c.*

In the raigne of E. 1. parliaments were very frequent, and often holden, and for the most part one parliament in two yeares.

King Edw. 3. ordained by authority of parliament, that a parliament should be holden every year once, or more often, if need be: to what end? for maintenance and execution of lawes, and for redresse of divers mischiefs, and grievances which dayly happen.

(15) *Quod curia domini regis deficiat, &c.*] For it is a rule in law, *quod curia regis non debet deficere conquerentibus in iustitia exhibenda.*

3 E. 2. ubi supra.
18 E. 2. Entry
74. 11 E. 2. Entry
68. ibid. 12
E. 2. 60. 7 E. 3.
17. 8 E. 3. 48.
6 E. 3. 39, 40.
16 Aff. p. 17.
Regist. 237. &
235. F. N. B.
207 b. 31 E. 1.
Entry 64.
Bract. li. 1. c. 2.
Britton, fo. 142.
19 H. 3. Juris
utr. 16. 1 E. 3.
7, 8. 2 E. 3. 7.
21 E. 3. 31. 37.
60. 33 E. 3.
Quar. Imp. 94.
37 Aff. 7. 18 Aff.
p. ult. 17 E. 3.
35. 49. 39 E. 3.
21. 35. 17 E. 3.
35. 49. 40 E. 3.
34. 38. 41 Aff. p.
28. 46 E. 3. petit.
18. 15 voucher
119. 13 H. 4. 4.
14 H. 4. 34.
* Mirr. c. 2. § 3.
& cap. 5. § 1.

In historia Eli-
ens. lib. 2. fo. 38.

4 E. 3. ca. 14.
36 E. 3. ca. 10.

W. 2. ca. 51.

C A P. XXV.

QUIA non est aliquod breve in cancellaria, per quod querentes habent tam festinum remedium (1), sicut per breve novæ disseisinæ, dominus rex voluntatem habens ut celeris fiat justitia, et quod dilationes (2) in placito communi amputentur et abbrevientur, concedit quod breve assise novæ disseisinæ locum habeat in pluribus casibus quam prius habuit (3). Et concedit quod de estoveriis bosci (4), proficuo capiendo in bosco, de nubicibus, et glandibus, et aliis * fructibus colligend' (5), de corrodio (6), liberatione bladi, et aliorum victualium (7), ac necessariorum (8) in certo loco annuatim recipiend' (9), tolneto, trona-gio, passagio, pontagio, pannagio, et his similibus in certis locis capiend' (10), custodiis boscorum, parcorum, forestarum, chacearum, warennarum, portarum, et aliis balivis (11), et officii in feod' (12), jaceat de cætero assisa novæ disseisinæ. Et in omnibus supradictis casibus modo consueto fiat breve de libero ten' (13). Et sicut prius jacuit, et locum habuit in communia pasturæ: ita de cætero locum habeat in communia turbariæ, piscariæ, et aliis commun' his similibus (14), quas quis habet pertinentes ad liberum tenementum, vel etiam sine ten' per speciale factum ad minus ad terminum vite. In casu etiam quando quis tenens ten' ad terminum annorum, vel in custod' illud alienat in feodo (15), et per illam alienationem transfertur liberum ten' in feoffatum, fiat remedium per breve novæ disseisinæ. Et habeantur pro disseisitoribus tam ille qui feoffat, quam feoffatus: ita quod vivente altero eorum locum habeat prædictum breve. Et si per mortem personarum cesset remedium per prædictum breve, fiat remedium per breve de ingressu:

FORASMUCH as there is no writ in the chancery whereby plaintiffs can have so speedy remedy, as by a writ of novel disseisin; our lord the king, willing that justice may be speedily ministred, and that delays in pleas may be taken away or abridged, granteth that a writ of novel disseisin shall hold place in more cases than it hath done heretofore; and granteth, that for estovers of wood, profit to be taken in woods by gathering of nuts, acorns, and other fruits, for a corody, for delivery of corn and other victuals and necessities to be received yearly (in a place certain) toll, tronage, passage, pontage, pawnage, and such like, to be taken in places certain, keeping of parks, woods, forests, chases, warrens, gates, and other bailiwicks, and offices in fee, from henceforth an assise of novel disseisin shall lie. And in all cases afore rehearsed, according to the customary manner, the writ shall be *de libero tenemento*; and as before times it hath lien and holden place in common of pasture, so shall it from henceforth hold place in common of turf-land, fishing, and such like commons, which any man hath appendant to freehold, or without freehold by special deed, at the least for term of life. In case also when any holding for term of years, or in ward, alieneth the same in fee, and by such alienation the freehold is transferred to the feoffee, the remedy shall be by a writ of novel disseisin, and as well the feoffor as the feoffee shall be had for disseisors, so that during the life of any of them the said writ shall hold place; and if by the death of the parties remedy happen to fail by that writ, then remedy shall be obtained

gressu (16): et quamvis superius fiat mentio (17) de aliquibus casibus, de quibus locum non habuit prius breve novæ disseisinæ, non propter hoc credat aliquis illud breve non competere, ubi prius competebat. Et licet dubitaverint quidam, utrum in casu quo quis pascat alterius seipale (18), fieri poterit remedium per prædictum breve, teneatur pro certo, quod in casu illo per prædictum breve bonum et certum est remedium. Caveant de cætero illi qui nominati sunt disseisores (19), quod non proponant falsas exceptiones, per quas captio assise differatur, dicendo quod alia transiit assisa de eodem ten' inter easdem partes, vel dicendo et mentiando, quod breve de altiori natura pendet inter easdem partes de eodem ten', et super his et consimilibus vocent rotulos, vel recordum ad warrantum, ut per illam vocationem asportare possint vesturam, et levare redditus, et alia proficua ad magnum detrimentum querentis. Et quia prius aliam pœnam non habuit, qui huiusmodi falsas exceptiones mendaciter proposuit, nisi tantum quod post mendacium suum convictum processum fuit ad captionem assise: dominus rex,

[410] cui odiosæ sunt huiusmodi falsæ exceptiones, statuit quod si quis assisor nominatus personaliter proponat illam exceptionem ad diem sibi datum. si defecerit de avarranto quod vocavit, habeatur pro disseisore absque recognitione assise, et restituat damna prius inquisita, vel post inquirenda de duplo: et nihilominus pro falsitate sua puniatur per prisonam unius anni. Et si illa exceptio proponatur per balivum, non propter hoc differatur captio assise, nec iudicium super restitutione ten' (20), et damni: ita tamen quod si dominus illius balivi, qui absens fuerit, postmodum veniat coram iustic', qui assisam ceperint, et offerat verificare per recordum, vel per rotulos, quod assisa alias transiit de eodem ten' inter easdem

tained by a writ of entry. And albeit that above mention is made of some cases wherein a writ of novel disseisin held no place before, let no man think therefore that this writ lieth not now where it hath lien before. And though some have doubted whether a remedy be had by this writ in case where one feedeth in the several of another, let it be had for certain, that a good and a sure remedy is given in that case by the said writ. And let them which be named disseisors beware from henceforth that they alledge not false exceptions, whereby the taking of the assise may be deferred, saying, that another time an assise of the same land passed between the same parties, or saying, and falsly, that a writ of more high nature hangeth between the same parties for the same land, and upon these and like matters do vouch rolls or records to warranty, to the end that by the same vouching they may take away the vesture, and receive the rents and other profits, to the great damage of the plaintiff. And where before none other pain was limited against him that falsly had alledged such untrue exceptions, but only that after such false surmises disproved the assise should pass; our lord the king, to whom such false exceptions be odious, hath ordained, that if any being named disseisor do personally alledge the exception at the day to him given (if he fail of the warranty that he hath vouched) he shall be adjudged for a disseisor without taking of the assise, and shall restore the damages before inquired of, or to be inquired after, to the double, and shall nevertheless have a year's imprisonment for his falsehood. And if that exception be alledged by a bailiff, the taking of the assise shall not be delayed therefore, nor the judgement upon the restitution of the lands and damages. Yet neverthe-

less,

easdem partes, vel quod querens alias se retraxit de brevi consimili, vel placitum pendeat per breve de altiori natura: fiat ei breve de faciendo venire super hoc recordum. Et cum illud habuerit, et videant iustic', quod recordum ita ei missum valeret ante iudicium, quod per illud excluderetur querens ab actione sua, fiatim faciant iustic' scire parti, quæ prius recuperavit, quod sit ad certum diem, ad quem rehabeat defendens seisinam suam, et damna, si quæ prius s'ovit per primum iudicium, simul cum damnis quæ habuit post primum iudicium reddit': quæ ei restituantur in duplo, sicut supradictum est: et nibilominus puniatur ille qui primo recuperavit, per prisonam secundum discretionem iustic'. Eodem modo si defendens, contra quem transiit assisa, in sua absentia ostendat chartas, vel quiet' clam' (21), super quarum consecutione non fuerunt iurat' examinati nec examinari poterunt, pro eo quod de eis non fiebat mentio in placitand', et probabiliter ignorare potuerunt consecutionem huiusmodi scriptorum: iustic' visis scriptis illis faciant scire parti, quæ recuperavit, quod sit ad certum diem coram eis: et venire fac' iurat' ejusdem assisæ. Et si per veredictum juratorum (22), vel forte per irretulamentum scripta illa verificaverint, puniatur ille, qui assisam impetravit contra factum suum, per pœnam supradictam. Nec capiat vic' de cætero bovem à disseisito, sed à disseisitore tantum (23). Et si plures sint disseisitores in uno brevi nominati, nibilominus de uno bove sit contentus (24): nec exigat bovem nisi de precio v.s. vel precium (25).

less, that if the master of such a bailiff that was absent, come after before the same justices that took the assise, and offer to prove by record or rolls, that another time an assise passed between the same parties of the same land, or that the plaintiff at another time did withdraw his suit in a like writ, or that a plea hangeth by a writ of more high nature, a writ of *venire facias* shall be granted unto him to cause the same record to be brought; and when he hath the same, and the justices do perceive, that the record so shewed by him would have been so available before the judgement, that the plaintiff by force of the same should have been barred of his action, the justices shall presently cause the party to be warned that first recovered, that he appear at a certain day, at the which the defendant shall have again his seisin and damages (if he before paid any by the first judgement given) which shall be restored him to the double, as before is said; and also he that first recovered shall be punished by imprisonment according to the discretion of the justices. In the same manner if the defendant, against whom the assise passed in his absence, shew any deeds or releases, upon the making whereof the jury were not examined, nor could be examined, because there was no mention made of them in pleading, and by probability might be ignorant of the making of those writings; the justices upon the sight of those writings shall cause the party to be warned that recovered, that he appear at a certain day, and shall cause the jurors of the same assise to come; and if he shall verifie those writings to be true by the verdict of the jurors, or by inrollment, he that purchased the assise contrary to his own deed, shall be punished by the pain aforesaid. And the sheriff from henceforth shall not take

take an ox of the disseisee, but of the disseisor only; and if there be many disseisors named in one writ, yet shall he be contented with one ox; nor shall receive any ox but of v. s. price, or the value.

(Regist. 196, &c. 8 Rep. 45. Fitz. Aff. 138. Fitz. Avowry, 142. Rast. 58, &c. Co. pla. 60. Regist. 197. Fitz. Aff. 61. 94. 111. 134. 167. 210. 316. 330. 439. 452. Fitz. Aff. 395. Fitz. Brief, 790. Bro. Elegit. 20. Bro. disseisin, 86. 105. Rast. 67. 11 H. 4. 84. Hub. 95. 11 H. 4. f. 49. 22 Ed. 3. f. 4. 30 Ed. 3. f. 12. Fitz. Record. 32. Bro. Cover, 35. 1 Roll. 91. Keilw. 131, 132. Fitz. Aff. 5. 123. Fitz. Certificate, 2, 3, 4. 7, 8. 10. F.N.B. 181, &c. Rast. 110. Regist. 200. 17 E. 3. f. 28. 12 H. 4. f. 9. 7 H. 4. f. 45. Fitz. Aff. 412.)

(1) *Tam festinum remedium.*] The assise of novel disseisin is not onely *maxime festinum, sed maxime beneficiale remedium*, for many causes:

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1. The defendant shall not be effaigned.
2. The defendant shall not cast a protection.
3. He shall not pray in aide, but of the king.
4. He shall not vouch any stranger, nor any party to the writ, unlesse he enter into warranty maintainant.
5. The same law of receipt.
6. The parol shall not demur, either for the nonage of the plaintiff, or the tenant, and for divers other causes.

(2) *Ut celeris fiat iustitia, et quod dilaciones, &c.*] This concerneth the common-wealth, for *expedit reipublicæ, ut sit finis litium*; and the duty of every good judge, for *boni iudicis est lites dirimere*. Regula.
Regula.

(3) *In pluribus casibus quam prius habuit.*] It is to be observed, that at the common law there were but two forms of writs of assise of novel disseisin in the register of the chancery, that is to say, an assise *de libero tenemento*, and an assise *de communia pasturæ* for his cattell, &c. which was so necessary, as without it his free-hold could not be manured: and the assise *de libero tenemento* did lye of houses, land, rent, and other things which lay in render, whereof a *præcipe* did lye at the common law; but of all profits *aprender*, which consisted in *capiendo, colligendo, habendo, recipiendo, et exercendo*, an assise of novel disseisin did not lye at the common law; but the party was driven to his *quod permittat*, in which was great delay, and they which had but an estate for life could not maintain that writ: therefore this act doth give in all the said cases a speedy remedy by an assise in lieu of the *quod permittat*, so the said profits were to be taken or had *in certo loco*; and therefore these words, *in pluribus casibus, &c.* are verified.

4 E. 2. Aff. 451.
35 Aff. p. 11.
11 H. 6. 22.

31 E. 1. Aff. 44c.
4 E. 2. ib. 449.
8 E. 2. ib. 385.
16 E. 2. ib. 37c.

(4) *De estoveriis bosci.*] These (as by this act appeareth) consist in *capiendo*.

Lib. 5. fol. 25.
lib. 8. fol. 47,
48. li. 9. fo. 112.

Of this word *estoverium*, and of the severall kindes thereof, I have spoken at large in other places.

(5) *De nucibus, glandibus, et aliis fructibus colligendis.*] These and the like consist in *colligendo*, and are to be taken in woods: *Notandum est quod sub nomine herbagii, non continetur glans, et ideo tempore glandis, et pessone excluduntur porci, et capræ, nisi ad hoc specialiter agatur, quod talem habeant communiam; glandis enim nomine continentur*

Bract. li. 4. 226.

continentur glans castanea, fagina, ficus et nuces, et alia quæq; quæ edi et pasci poterunt præter herbam.

Virg. Geo. 4.

44 E. 3. 24, 25.

Nec de concussa tantum pluit ilice glandis.

(6) *De corrodio.*] This being a reasonable sustenance for a man, consisteth in *habendo*, as by the writ *de corrodio habend'* appeareth.

Lib. 8. fol. 46.
Jehu Webs case.

And albeit this act speaketh *de corrodio*, yet an assise shall be maintained of the part of a corrodie, but therein also are diversities, as you may read, lib. 8. in Jehu Webs case.

(7) *De liberatione bladorum, et aliorum victualium.*] These consist in *recipiendo*, as belonging to a corrodie.

(8) *Ac aliorum necessariorum.*] These also consist in *recipiendo*, as things *quæ pertinent ad victum, vestitum, et habitacionem hominis.*

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(9) *In certo loco annuatim recipiendis.*] Note this clause, *in certo loco*, extends to cistovers, and all the profits *aprender*, and not to the clause of offices. But yet the office must be *in certo loco*, which is so to be understood, as albeit the office be removeable, yet it must be *in certo loco*, when the assise is brought.

Jehu Webs case,
ubi supra.

(10) *Tolneto, tronagio, passagio, pontagio, pannagio, et hiis similibus in certis locis capiend'.*] These consist in *capiendo*, and of these you may read at large in Jehu Webs case, ubi supra.

7 E. 3. 63. 8 E. 3.

55, 56. 10 E. 3.

27. 18 E. 3. 27.

19 E. 2. Vieu.

77. 7 Aff. 12.

10 Aff. 11.

30 Aff. 4.

18 E. 2. Aff. 377.

4 E. 2. ib. 449.

8 E. 2. ib. 385.

16 E. 2. ib. 370.

7 H. 6. 8.

22 H. 6. 9. 9 E. 4.

6. 27 H. 8. a.

28 H. 8. Dier, 7.

3 Mar. Dier,

153. 31 H. 8.

Br. gentes 134.

* Jehu Webs

case, ubi supr.

F.N.B. 178. f.

† 31 E. 1. Aff.

440. 21 E. 3.

4. b. 27 H. 8. 12.

13 E. 3. Parl. 23.

32 Aff. 23. 8 Aff.

4. 3 E. 3. Aff.

175. 22 H. 6.

11. 15 E. 4. 4.

30 Aff. 4.

11 Aff. p. 13.

lb. 5. fol. 61.

J. Webs case.

(11) *Custodiis boscorum, parcorum, forestarum, chacearum, warrenarum, portarum, et aliis balivis.*] Of these and other offices, you may read at large in Jehu Webs case; and this act concerning these offices is but declaratory, for an assise did lye of them at the common law, because a *præcipe* did lye of them, as in that case it appeareth.

(12) *Et officiis in feodo.*] This statute being herein (as hath been said) made in affirmance of the common law, although the statute speaketh onely of offices in fee*; yet such as have offices in tail, or for life, shall have an assise, as by the authorities before cited doth appear.

† And albeit the words be generall, yet this act is onely to be intended of offices of profits, and not of offices of charge, and no profit.

But this act doth extend aswell to offices in the admirall court ecclesiasticall court, or any other court, where either the civil or ecclesiasticall law, or any other law then the common law, &c. of England doth rule; as to offices in temporall courts which are governed by the common law, &c. as by the authorities abovesaid, and Jehu Webs case appeareth.

If a man be disseised of the whole office, he shall have an assise *de officio cum pertinen'*; and albeit the statute speaketh, *de officiis*, and if he be disseised of parcell of the profits, he may have an assise of that parcell: but therein also are diversities, as you may read in Jehu Webs case.

(13) *Breve de libero tenemento.*] So as now by this act, in all the cases abovesaid concerning profits *aprender*, the assise of novel disseisin shall be *de libero tenemento*.

(14) *Et sicut prius jacuit, et locum habuit in communia pasturæ, ita de cætero in communia turbariæ, piscariæ, et aliis communibus hiis similibus.*] Bracton, who wrote before the making of this act, saith, *Quod locum habet assisa de qualibet communia pertinen' ad liberum tenementum.*

Bract. li. 4. fol.

231. 23 H. 3.

Aff. 438.

nementum, scil. communia pasturæ, turbariæ, &c. And in the reign of H. 3. which was before the making of this act, an assise did lye of a common of piscarie; and these opinions had great probability of reason: yet because (as hath been said) there was no writ in the Register in those cases, therefore before this act no writ did lye by the generall opinion of the judges; but now this act hath cleared the question.

(15) *In casu etiam quando quis tenet tenementum ad terminum annorum, vel in custodiam, et alienat in feodo.*] This branch is an affirmation of the common law, for the free-hold being in the lessor, or in the heir, the livery being made by the lessee for yeers, or gardein, doth work a disseisin, because by his torcious livery he disseiseth the lessor or heir, for the which they may have an assise of novel disseisin at the common law, and both the feoffor for making, and the feoffee for taking a torcious livery were both disseisors: and so it is if tenant at will, or tenant at sufferance make a lease for yeers, and the lessee enter, this is a disseisin to the lessor at the common law.

This act speaketh first of a tenant for yeers, and yet a tenant by elegit, statute merchant, or the staple are within this law: and so it is of a tenant at will, or a tenant at sufferance, for all these have a possession, but otherwise it is of a bailife, for he hath no possession at all.

2. Of gardein, which extendeth not onely to gardein in chivalry, but to gardein in socage, *et per causæ de nurture.*

3. * Of an alienation in fee, and yet an alienation in tail, or for life is within this act, because they are within the same mischief.

4. † If tenant for yeers, or a gardein make a lease for life, the remainder for life, the remainder in fee, and tenant for life enter, he is a disseisor, because he taketh the first livery; and so it is of him in the remainder for life, or in fee, if he enter.

(16) *Fiat remedium per breve de ingressu.*] Here it is objected, that if *sam feoffator, quam feoffatus* be disseisors, by the common law, and so declared by this statute:

1. How the lessor or heir can have a writ of entry, and suppose the entry by the lessee or gardein?

2. Whether the lessor or the heir may not have an election, either to have his assise, or his writ of entry?

To the first it is answered, that albeit it be a disseisin, having regard to the lessor or heir, for the benefit of the assise; yet between the lessee or gardein, and the feoffee, it is a feoffment, whereunto a warranty may be annexed, and a voucher had of them, to recover in value (as in another place hath been said) so as the lessor or the heir may have a writ of entry in the *per* against the alienee, and principally, because it is affirmed by this act.

To the second, this act hath prescribed a form and order concerning alienations after the act, *viz.* that living either the feoffor or feoffee, an assise should lye; and therefore living either of them, a writ of entry doth not lye: but for alienations before this act, a writ of entry might have been brought since this act.

(17) *Et quamvis superius fiat mentio, &c.*] This is but *abundans cautela*, and yet prudently added *ad majorem rei securitatem.*

(18) *Et licet dubitaverint quidam utrum in casu quo quis pascat aliterius sepevale, &c.*] This assise was in this case maintainable by the common law.

12 H. 3. ib. 417.
Temps R. 2.
Grant 104.

4 E. 2. Ass. 790.
19 E. 2. ib. 400.
3 E. 4. 1.
15 H. 7. 4.

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12 E. 4. 12.

See the ancient
Terms, cap. Ele-
git. 3 E. 4. 1.
4 E. 2. Ass. 790.

8 Ass. 23. 8 E. 3.
63. 15 H. 3.
Bre. 878.
20 H. 3.
Ass. 432.
* Bract. li. 4.
f. 216.
Brit. cap. 32.
Disseisin.
Fleta, li. 4. c. 17.
7 E. 3. 11.
43 Ass. 45.
† 50 E. 3. 22

See the first part
of the Institutes,
sect. 698. & 611.

4 E. 2. Ass. 790.
19 E. 2. ib. 400.
15 H. 3.
Bre. 878.

27 Aff. p. 30.
Kelwey, 12 H. 7.
20. F.N.B.
178. h. Liure de
Entries Raft. 65.

These words are to be intended, when one claimeth common in the severall land of another, and puts in his cattell to use the same; the owner of the soil hath two wayes to help himself, either to waive the possession, and then to bring his assise as one out of possession, as in the common case of a disseisin, and then he shall have judgement to recover the land and damages; or else he may keep his possession, and bring his generall writ of assise of novel disseisin: and if the tenant plead to the assise, that the plaintife was tenant of the land the day of the writ purchased, and yet is; the plaintife may maintain his writ, and say, that the land was, and is his severall, and the defendant did feed his severall with his cattell, and according to this branch of this act he prayeth the assise; and in this case if it be found for the plaintife, he shall have judgement to hold the land as his severall, and damages.

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Note that in this case he is not disseised of the land, but of the severalty of his land.

And this feeding is to be understood, when one claimeth a common appendant, appurtenant, or in grosse, and for the use of the same doth put in his cattell; this claim, and putting in of his cattell is a disseisin of the severalty of the land, and shall have judgement, as is aforesaid, accordingly: but if the cattell come in by way of escape, this is a trespassse, and no disseisin of the severalty within this statute.

Braet. li. 4. fo.
217. Fleta, li. 4.
cap. 1. 27 Aff.
p. 51. 28 Aff.
p. 50. F.N.B.
178. i.
Braet. li. 4.
fo. 216.

By the common law a man that is in seisin of his land may have an assise, for that he is disseised of the quiet injoying of his land; as when the lord, or any other that hath a rent, and oftentimes distreineth for the rent, where none is behinde, the tenant shall have an assise of novel disseisin of the land, for that, by reason of the frequentie of distresses, he is disseised of the quiet injoying of his land, and cannot make his advantage thereof, and *frequentia mutat transgressionem in disseisinam*.

Mirror, ca. 2.
§ 15. Brit.
fol. 108.

And the Mirror saith, that disturbance of one that is in peaceable possession, in three cases doth amount to a disseisin: as if the lord that is in quiet possession of his rent cometh to distrein, and is by the tenant disturbed, so as he cannot take a distresse, this disturbance is a disseisin of the rent.

2. When the lord hath taken a distresse, and the tenant pay not his rent, but disturb him by unjust sute of a replevie.

3. When any distrein so outrageously (that is, so often) as the terre tenant cannot plough, or duly use his ground.

13 Aff. p. 1.
26 Aff. p. 35.
44 E. 3. 23.
7 H. 4. 16. 1 H. 4.
51, 52. Bro. covert. 68. Doct. &
Stud. li. 2.
fo. 113. 29 E. 3.
27. M. 18 E. 1.
Coram rege
Rot. 35. North.
13 R. 2.
Record 32.

(19) *Caveant de cetero illi qui nominati sunt disseisitores, &c.*] A feme covert and an infant are not within this statute to have corporall punishment by imprisonment by their plea, by vouching of a record, and failing of it.

This act doth not extend to an assise of mordanc.

See a notable record soon after the making of this act, upon this branch of this act, Mich. 18 E. 1. *Coram rege* Rot. 35. North.

In a formedon, or any other reall action, if the tenant plead a record, and fail thereof at the day, the demandant shall not have seisin of the land, but onely a petit cape: for this statute extendeth onely to the assise of novel disseisin: and in case of the assise, if the tenant before this statute had pleaded a record, and failed thereof, yet the assise should have been taken, as appeareth by this act.

Here it is to be observed, that every man shall plead that, which is apt and pertinent to his case; and therefore a disseisor that is not tenant of the land shall not plead any thing that concerns the tennancie of the land, as a release of all actions realls, but shall plead a release of actions personalis, or any other plea that doth excuse himself of damages.

(20) *Et si illa exceptio proponatur per balivum, non propter hoc differatur captio assise, nec judicium, super restitutione tementi, &c.*] In an assise, as by this branch it appeareth, the bailife cannot plead any matter of record, either in barre or to the writ; for the bailife cannot plead any matter, or any plea out of the point of the assise, nor any thing that is not triable by the assise, nor any plea which he cannot conclude, *Et si trowe ne joiit nul tort, nul disseisin.* Hereby it appeareth what treasure may be found in the mines of these ancient statutes.

And if therefore the bailife do plead any matter of record, yet the justices shall proceed, &c. and give judgement; but then the defendant named in the assise may come unto the justices, and verifie that there was such a matter of record, &c. and he shall have a certificate of assise by force of this act.

And the writ that is given in this case is after judgement, but the certificate of assise that was at the common law was after verdict; and before or after judgement when the verdict was not well examined by the justices, &c. the justices of office might examine it, whereof we need not to treat any further in this place, for that this statute doth not extend to that kinde of certificate; onely I may note two things, 1. That when the recognitors of the assise give a full generall verdict, there lyeth no certificate at the common law. 2. That if any of the recognitors of the assise that gave the verdict died, the certificate failed at the common law, for it was to supply the defect of their former verdict: see hereafter more of this matter in this chapter.

Note the words of the assise are *attachias eum, vel balivum suum, &c.* And the bayliffe plead in his own name; *I. de C. tanquam balivus A. de B. dicit:* and not *A. de B. per balivum suum.*

(21) *Eodem modo si defendens, contra quem transivit assisa, in sua absentia ostendat chartas, vel quiet' clam', &c.*] This branch doth not onely extend to an assise of novel disseisin, but to the assise of *darrein presentment, juris utrum*, and assise of mordaunc', and some have thought to an attainr also: so as the tenant shall not onely have a certificate of an assise by the former branch upon matter of record, but also by this branch upon deeds and quiet claimes, and the reason thereof is, for that the bayliffe could not plead the same.

And it is to be observed, that after the bayly hath pleaded to the assise, the tenant may come before the assise taken, though it be after the assise awarded, and plead any deed, quiet-claime, or other matter of certificate, and shall not bee driven after the assise taken, &c. to sue his certificate upon this act to trouble the tenant and the recognitors of the assise, *quia frustra fit per plura, quod ferè potest per pauciora.*

(22) *Venire facias jurat' ejusdem assise: et si per veredictum juratorum, &c.*] Upon this branch it hath been conceived, that albeit that some of the former recognitors be dead, that it shall be tried by the former and by others; for though this act doth ordain that a *venire facias* shall be awarded to the jurors of the same assise, yet the

1. Part of the Institutes, f. 2.
494. l. b. 7.
fol. 26.

1 Aff. Pl. 1.
2 Aff. Pl. 4.
8 E. 3. 1.
8 Aff. 2. 9 E. 3.
13. 16. 9 Aff. 4.
25 Aff. 26.
8 H. 6. 9.
21 H. 6. 53.
22 H. 6. 24.
1 E. 4. 4. 8 H. 7.
11. 9 H. 7. 24.
11 H. 7. 11.
F. N. B. 182. a.

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Braft. l. 4. fol.
234. &c. 293.
Britton, fo. 239.
43 Aff. 1. 5.
Regist. 200. Ju-
dici' 22. 17 E. 3.
28. 12 H. 4. 9.
2 H. 5. 3.
F. N. B. 180.
183. Ven. N. B.
11 L. &c. Hil.
10 E. 1. coram
rege Rot. 35.
Suff. 8 E. 2.
Aff. 112.
12 H. 4. 9.

Regist. Judic'
11, 12.
12 H. 4. 6.
F. N. B. 183. r. f.
& 196. c. 32 Aff.
p. 1. 2 H. 5. 5.

33 H. 6. 20.

11 H. 7. 11.
11 Aff. p. 7.
11 E. 3. Aff. 85.
20 Aff. 6.
50 E. 3. 20.

12 H. 4. 10.
7 H. 4. 45.
33 Aff. 1.
F. N. B. 183. c.

the subsequent words be, *et si per veredictum juratorum*, and saith not *prædictorum*; so as upon this act an addition may be made.

In an assise the plaintiffe made title to ten marks rent by specialty of the graunt of the tenant, and the assise was taken by default, and after the tenant upon shewing of a deed of defeasance of the same rent upon certain conditions to be performed on the plaintiffes part, or otherwise the rent to cease, which he averred to be broken, which deed of defeasance did beare date in a forein county, *viz.* in London, whereupon a certificate upon this statute was prayed before the justices of assise, who adjourned the same in bank to be resolved, whether a certificate did lie upon this forein defeasance: where it was awarded that the certificate was maintainable, and that the deed of defeasance being denied should be tried in London, where it was found for the tenant, whereupon the certificate was remanded to be taken in the county where the assise was brought: out of this record three things are to be observed.

1. That a certificate doth lie upon a defeasance bearing date in a forein county (as well as upon a charter or acquittance) which was tried by jurors of that forein county, and by none of the recognitors of the assise.

2. That a certificate lieth by this act upon a recovery by default, as well as where the tenant pleadeth by bayly to the assise.

3. That the certificate must be sued and adjudged in the county where the assise was sued.

(23) *Nec capiat vic' de cætero bovem à disseisito, sed à disseisitore tantum.*] This ox which the sheriffe tooke was not any reward for doing of his office (*pro officio suo exequendo*) for that was prohibited by the statute of W. 1. cap. 26. but this was a duty due by auncient custome after the cause ended.

But where it was due onely from the disseisor, the sheriffe before this act did also inroach the like upon the disseisee, which is restrained by this act, and to be taken onely of the wrong doer, and neither of the disseisee, nor of the tenant that is no disseisor.

(24) *Et si plures sint disseisitores in uno breve nominat, nihilominus de uno bove sit contentus.*] This branch is in affirmance of the law, for seeing they are joyned in one writ, they are as to this purpose but as one disseisor, and therefore but one ox is due unto the sheriffe.

A man that is indicted and arraigned for two felonies, shall pay but for one deliverance onely, for though the felonies be severall, yet the person that is delivered is but one.

(25) *Nec exigat bovem, nisi de precio 5. s. vel precium.*] Herein the makers of this law did adde this branch very providently, for there is nothing more incertaine then prices of things which oftentimes rise and fall, and specially of victuals, and therefore here having set down the price of the ox, they adde, if that should not bee the just price of the ox, which they foresaw might not continue long, then the sheriffe should have 5. s.

32 Aff. p. 1.
14 E. 3. receipt
134. Br. certifi-
cat Daff. 13.
Pasch. 31 E. 3.
fol. 35. in libro
meo, le Coun-
tesse de Atholes
case.

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26 Aff. p. 5.
12 H. 4. 20.
F.N.B. 182. c.
W. 1. c. 26.
42 E. 3. 5.
4 E. 4. 10.
21 H. 7. 17.
Stamf. Pl. Cor.
49. a.
Tinn.

26 Aff. p. 47.

CAP. XXVI.

IN brevibus de redisseisina adjudicentur de cætero damna in duplo: et sint redisseisitores de cætero irreplegiabiles per commune breve. Et sicut in statuto de Merton provisum fuit illud breve de his qui disseisint fuerint, postquam recuperaverint per assisam novæ disseisinæ, mortis antecessoris, aut per alias juratas ulterius de cætero habeat illud breve locum in illis qui recuperaverint per defaultam, redditionem, aut alio modo sine recognitione assisarum vel juratarum.

IN writs of redisseisin from henceforth double damages shall be awarded, and the redisseisors shall not be repleviable hereafter by the common writ. And like as in the statute of Merton the same writ was provided for such as were disseised after they had recovered by assise of novel disseisin, of mortdauncestor, or other jurates; even so from henceforth the same writ shall further hold place for them that shall recover by default, reddition, or otherwise, without recognition of assises or jurates.

(15 H. 7. f. 8. 1 Inst. 154. 20 H. 3. c. 3. 52 H. 3. c. 8. Raft. 548.)

By the statute of Merton both the writ of *redisseisin*, and of the *post disseisin* were given. Merton, cap. 3.

This statute is an act additionall in three severall points.

1. Where the statute of Merton gave but single damages, this act doth give double damages both in the *redisseisin* and *post disseisin*, but the jury is to give the single, and the court is to double them.

2. Where notwithstanding the statute of Merton and of Marlebridge, cap. 8. he might be replevied by the common writ, yet by this act he cannot so be. Marlb. cap. 8.

3. Where the statute of Merton extended onely to redisseisins upon recoveries in assise of *novel disseisin* by verdict of the recognitors, and to *post disseisins* upon recoveries by verdict onely; this act doth extend to recoveries by default, reddition, *aut alio modo*, as upon demurrer, &c. so as hereby the *redisseisin*, and *post disseisin* doe lie in many more cases then they lay before. [417]

See before in the exposition of the statute of Merton and Marlebridge.

If an assise be brought against A. and B. and A. is found the disseisor, and B. the tenant, and the plaintiffe recovereth, and B. the tenant disseiseth the plaintiffe again, the plaintiffe shall have no *redisseisin*, but a *post disseisin*, because a *redisseisin* lieth not but against him that was party to the former disseisin.

C A P. XXVII.

POSTQUAM aliquis posuerit se in inquisitionem aliquam ad proximum diem, allocetur ei essonium: sed ad alios dies sequentes per essonium non differatur captio inquisitionis, sive prius habuit esson', sive non. Nec admittat' esson' post diem datum prece partium (1), in casu in quo partes consentiunt venire sine essonio.

AFTER any hath put himself to an inquest, an essoin shall be allowed him at the next day; but all the other days following, the taking of the inquest shall not be delayed by the essoin, whether he were essoined before, or no; neither shall any essoin be allowed after day given prece partium, in case where the parties consent to come without essoin.

(Fitz. Essoin. 15. 81. 83. 130. Dier, 224. 324. Bro. Parl. 5. Raft. 297.)

Marlb. cap. 13.

The statute of Marlebridge did provide, *Quod postquam aliquis posuerit se in inquisitionem aliquam, &c. non habebit nisi unicum essonium, &c.* By which statute it was not certainly limited when he should have that one essoine, and thereof ensued a great mischief, for the defendant would not be essoined but at the *habitas corpus*, and then the jurors should lose their issues, and the inquest should not bee taken, to the great vexation and losse of the jurors.

And therefore this statute chiefly for the ease of the jurors provideth, that the defendant should have but one essoine, and that essoine must be at the next day, and that is at the *venire facias*, and if he neglect that next time, he shall never have it after.

7 E. 2. essoin
St. 83. Dier,
15 El. 324. b.

This act is to be intended onely of a plea personall, and of a common essoine, and not of an essoine *de service le roy*, for that he may cast when he will. See the exposition upon the statute of Marlebridge, cap. 13.

15 H. 6. 53.

And about the words of this act are generall, yet it must be understood onely in cases where an essoine doth lie, which is implied by this word *allocetur*, and therefore if the defendant come in by *exigent*, or *cepi corpus*, and joyne issue *ad proximum diem*, he cannot be essoined, for that he either remaineth in ward, or goeth by mainprise, and therefore before this statute could not be essoined; and this is a branch of restraint, and not of enlargement.

(1) *Nec admittatur essonium post diem datum prece partium.*] And the reason is, for that seeing this day is given by the prayer and agreement of the parties without any essoine, this statute doth enact, that *post diem datum prece partium*, no essoine shall be admitted.

C A P. XXVIII.

CUM per statutum Westm. 1. statuatur quod postquam tenentes semel comparuerint in curia, non allocetur eis essoinum in brevibus assisarum (1): eodem modo (2) de cætero observetur de petentibus.

WHEREAS by the statute of Westminster the First, it was provided, that after the tenants have once appeared in the court, no essoin should be allowed them in writs of assises; in like manner it shall be from henceforth observed against the demandants.

W. 1. cap. 41. (Fitz. Essoin, 65, 66, 68, 69, 78, 149. Raft. 316.)

(1) *In brevibus assisarum.*] This act extendeth not to assises of novel disseisin no more then the said statute of W. 1. here recited doth: see before the exposition of the statute of W. 1. and the rather for that this act saith *de petentibus*, and the plaintiffe in an assise of novel disseisin is called *querens* and not *petens*, but this act extendeth to mordaunc', *juris utrum*, and attaints, and doth remedy the mischief of the demandants side, which was omitted in the statute of W. 1. And note that a writ of attaint is here comprehended under this word *assisa*, because it hath the quality of an assise, *viz.* to have a jury returned the first day, and so in equall mischief.

(2) *Eodem modo.*] This is an act of reference, that in all cases where the act of W. 1. doth take away the common essoin from the tenant after appearance, there this act doth take it from the demandant after appearance. See more of this matter in the exposition upon the said act of W. 1.

C A P. XXIX.

BREVE de transgressione (1) ad audiendum et terminandum de cætero non concedatur coram aliquibus justiciariis, exceptis justiciariis de utroque banco (2), et justiciariis itinerantibus, nisi pro enormi transgressione, ubi necesse est apponere festinum remedium (3). Et dominus rex de gratia sua speciali (4) hoc duxit concedendum. Nec etiam de cætero concedatur (5) breve ad audiend' et terminand' appella coram justic' assign', nisi in speciali casu, et certa causa,

cum

A WRIT of trespass (*ad audiendum et terminandum*) from henceforth shall not be granted before any justices, except justices of either bench, and justices in eyre, unless it be for an heinous trespass, where it is necessary to provide speedy remedy, and our lord the king of his special grace hath thought it good to be granted. And from henceforth a writ to hear and determine appeals before justices assigned shall not be granted but in a special case, and for

3 C 2

2 cause

cum dominus rex hoc præceperit. Sed ne hujusmodi appellati, vel indictati diu detineantur in prisona, habeant breve de odio et atia (6), *sicut in Magna Charta, et aliis statutis dictum est.*

a cause certain, when the king com-mandeth. But lest the parties appealed or indicted be kept long in prison, they shall have a writ of *odio et atia*, like as it is declared in Magna Charta and other statutes.

Mag. Chart. c. 26. W. 1. cap. 11. Gloc'. cap. 9. (4 Inst. 182. Stat. 2 E. 3. c. 2. Regist. 123. Regist. 133. 9 H. 3. stat. 1. c. 26.)

(1) *Breve de transgression.*] Albeit the statute mentioneth only a writ, because commissions were in those dayes most commonly graunted by writ, as the commission to justices in eyre, justices of oier and terminer, of gaole delivery, &c. yet this act doth not onely extend to authority graunted by writ, but by commission also.

[419] Transgression here is taken in a large sence, for any outrage or misdemeanour.

Commissions of oier and terminer are of three sorts.

2 E. 3. cap. 8. One generall at the sute of the king, as to hear and determine all manner of treasons, felonies, riots, routs, trespasses, &c.

29 E. 3. 37. Another particular at the sute of the party, and that in two sorts: one naming particularly the party grieved, as *Rex dilectis et fidelibus suis A. B. & C. salutem. Ex gravi querela D. accepimus quod E. F. & G. et alii malefactores, et pacis nostre perturbatores in ipsum D. apud N. vi et armis insultum fecerunt, &c.* And the other is more generall, and of this form, *Rex dilectis, &c. Ex clamoris querimonis diversorum hominum de com' N. ad nostrum sapius pervenit auditum, quod A. episcopus Winton', &c. plures et diversas oppressiones, &c.*

The third is aswell at the suit of the king, as of the party, all in one writ or commission, as hereafter in this chapter shall be touched.

The mischief before the making of this act was, that commissions of oier and terminer, &c. were procured, and named by the parties whom the matter concerned; so as the commissioners were neither indifferent, nor of sufficient knowledge and learning. And the mischief was the greater, for that when a man sued out a commission of oier and terminer at the suit of the party against divers persons for taking of his goods, and for effoigning the same, to the end to waste and convert the same to their own uses; the party that sued the oier and terminer should have a writ to the sheriff, rehearsing this matter, and command him to arrest the goods, and to put them in safeguard untill it be otherwise provided or adjudged by the justices of oier and terminer, &c. and if upon this sute it were found for the plaintife, the justices of oier and terminer might restore the party to his goods, or give damages to him for them, wherein it doth vary from an action of trespass sued before justices of the one bench or the other: and where the party in particular is to be restored to his goods, or to recover damages, the sute is properly by writ, according to the words of this act (*Breve de transgression*;) and by the statute of 34 E. 3. the commissioners or justices named in the writ are to be named by the court, and not by the party.

The

Regist. 126, 127.
F.N.B. 112. f.

F.N.B. 112. f.

Regist. 123.
34 E. 3. cap. 1.

The ancient form of commissions of oier and terminer were of
all treasons, felonies, &c. grievances, extortions, and deceits made
to the king and to his people, aswell at the suit of the king, as of
the party, &c.

42 Aff. p. 5.

If a commission of oier and terminer be discontinued or expired,
&c. the indictments and records shall be removed into the kings
bench, as to their proper center.

44 E. 3. 31.
F.N.B. 243.
38 H. 8.
Committ. Br.

(2) *Exceptis iusticiariis de utroque banco.*] Here is remedy for
both the said mitchiefs, for the justices of either benches are pre-
sumed to be men of integrity, indifference, skill, and knowledge.

Hereof you may read in Stamford.

Plac. cor. 55, 56.

(3) *Nisi pro enormi transgressionem, ubi necesse est apponere festinum
remedium.*] Here it is called, *enormis transgressio*.

In the statute of 2 E. 3. cap. 2. it is called, *grand leads*, or hor-
rible trespasses.

Fitzherbert saith, that this writ is to be granted when a great
assembly, insurrection, or heinous misdemeanour, or trespass is
committed in any place, then the manner and use is to make such
a commission, to hear and determine such misbehaviours.

F.N.B. ubi sup.

The Register termineth it, *enormis seu horribilis*.

Regist. 125. a.
Regist. 124. b.
12 Aff. p. 21.

And if the trespass be not *enormis seu horribilis*, there lyeth a
writ of *superfedeas*, or revocation, *quia non enormis, seu horribilis*.

(4) *Dom' rex de gratia sua speciali, &c.*] This is an act of grace,
for hereby the king is restrained of his power to grant commissions
of oier and terminer to whom he will at his pleasure.

[420]
Magna Charta,
c. 8. W. 1. c. 42.
Nota.

The stile of the record before justices or commissioners of oier
and terminer, sometimes have been, *coram rege et concilio suo apud S.*
&c. and sometime, *coram concilio regis apud, &c.* whereof take one
record for example, filed thus:

*Placita coram concilio regis apud Westmon' de termino Pasche, anno
regni regis E. 3. 11. Nicholas Keriels case in a commission of oier
and terminer.*

Pasch. 11 E. 3.
Coram conc.
regis.

(5) *Nec etiam de cætero concedatur.*] An appeal doth lye either
by writ originall, or by bill.

Brit. fol. 5.
22 E. 3. Coron.
97, 98. 4 H. 6.
15. Regist. ju-
dic. 76. 3 H. 7.
ca. 1. 9 H. 4. 2.
13 H. 4. 10.
17 E. 3. 15.
22 E. 4. 19.
Dier, 120.

The originall writ issueth out of the chancery. By bill, as in
the countie before the sherife and coroners; also before justices of
gaol-delivery, if the appellee be in prison before them, and (as it
appeareth by this act) before commissioners of oier and terminer,
before justices of *nisi prius*, and by bill also before the justices of
the kings bench.

It seemed to Fitzherbert, in abridging of the case of 44 E. 3.
that justices of peace having power by the statute of 34 E. 3.
(which there is called, *le novel statute*) might receive an appeal
by bill, because they had power to hear and determine felonies;
but that statute doth give them power to hear and determine felo-
nies at the sute of the king, and the book at large speaketh onely
of justices of gaol-delivery.

44 E. 3. 44. tit.
Coron. F. 95.

(6) *Sed ne hujusmodi appellati, vel indiciati diu detineantur in pri-
sona, habeant breve de odio et atia.*] See before in Magna Charta,
cap. 26. & 29. Gloc. cap. 9. this branch well explained.

C A P. XXX.

ASSIGNENTUR de cætero duo justiciarii jurati, coram quibus, et non aliis (1) capiantur assise novæ disseisinæ, mortis antecessoris, et attinetæ: et associant sibi duos, vel unum de discretioribus militibus com', in quem venerint: et capiant assisas prædictas, et attinetas, ad plus ter per annum (2); viz. semel inter quindenam sancti Johannis Baptistæ (3), et gulam Augusti (4): et iterum inter festum exaltationis sanctæ crucis, et cætab. sancti Michaelis: et tertio inter festum epiphaniæ, et festum purificationis beatæ Mariæ. Et in quolibet com', ad quamlibet captionem assise, antequam recedant, statuant diem de reditu suo (5); ita quod omnes de com' scire possint eorum adventum; et de termino in terminum adjornent assisas (6). Si per vocationem warranti (7), per esson' (8), vel per defectum recognitorum, si ad unum diem captio earum differatur. Et si

[421] aliqua de causa viderint, quod utile sit, quod assise mortis antecessoris per essonium, vel vocationem warranti respectu adjornentur in banco, liceat eis hoc facere, et tunc mittant justiciar' de banco recordum cum brevi originali. Et cum sequela pervenerit ad captionem assise, remittatur sequela (9) cum brevi originali per justiciar' de banco, ad priores justiciar': coram quibus capiatur assisa. Sed de cætero dent justic' de banco in hujusmodi assis ad minus quatuor dies per annum, coram præfat' justic' assignatis, ut parcant laboribus et expensis. Aterminentur inquisitiones capiendæ de transgress' placitat' coram justiciar' de utroque banco: nisi ita enormis sit transgressio, quod magna indigeat examinatione. Aterminentur etiam inquisitiones coram eis de aliis placitis

FROM henceforth two justices sworn shall be assigned, before whom, and none other, assises of novel disseisin, mortdauncestor, and attaints shall be taken, and they shall associate unto them one or two of the discreetest knights of the shire into which they shall come; and shall take the foresaid assises and attaints but thrice in the year at the most, that is to say, first between the quinzime of Saint John Baptist, and the gule of August; and the second time, between the feast of the exaltation of the holy cross, and the utas of Saint Michael; and the third time, between the feast of the epiphany, and the feast of the purification of the blessed Mary. And in every shire at every taking of assises before their departure, they shall appoint the day of their return, so that every one of the shire may know of their coming, and shall adjourn the assises from term to term, if the taking of them be deferred at any day by vouching to warranty, by essoin, or by default of jurors. And if they see that it be profitable for any cause that assises of mortdauncestor, being respited by essoin or voucher, ought to be adjourned into the bench; it shall be lawfull for them to do it, and then they shall send the record with the original writ before the justices of the bench; and when the matter is come to the taking of the assise, the justices of the bench shall remit the matter to the former justices before whom the assise shall be taken. But from henceforth the justices of the bench in such assises shall give four days at the least in the year before the said justices assigned, for to spare expence and labour. Inquisitions of trespass

placitis placitatis in utroque banco, in quibus facilis est examinatio, ut quum deditur ingressus, vel seifina alicujus, vel in casu quum de uno articulo sit inquirend'. Sed inquisitiones de gressis et pluribus articulis, qui magna indigeant examinatione, capiantur coram justic' de bancis, nisi ambæ partes petant (10); quod inquisitio capiatur coram aliquibus de societate, cum in partes illas venerint: quod de cætero non fiat nisi per duos justic', vel unum, cum aliquo milite de com', in quem partes consentiunt. Nec atterminentur hujusmodi inquisitiones coram aliquibus justiciariis de banco, nisi statuatur certus dies et locus in com', in præsentia partium: et dies et locus inferantur in brevi de judicio per hæc verba (11):

Præcipimus tibi quod venire facias coram justiciariis nostris apud Westmonast', in octa. sancti Michaelis, nisi talis et talis tali die et loco ad partes illas venerint, xii. &c.

Et cum hujusmodi inquisitiones capte fuerint, retournentur in bancis, et ibi fiat judicium, et irrstulentur (12). Et si omissa forma prædicta aliquæ inquisitiones capiantur, pro nullis habeantur (13). excepto quod assise ultimæ præsentationis, et inquisitiones super quare impedit atterminentur in proprio com' coram uno justiciar' de banco, et uno milite, ad certos tamen diem et locum in banco statutos, sive defendens consentiat, sive non: et ibi statim reddatur judicium (14). Habeant de cætero omnes justiciarii de bancis in itineribus clericos irrotulantes omnia placita coram eis placitat',
fiat

trespass shall be determined before the justices of both benches, except the trespass be so hainous that it shall require great examination. Inquisitions also of other pleas pleaded in either of the benches, shall be determined before them, wherein small examination is required, as when the entry or seisin of any is denied, or in case when one article is to be inquired. But inquisitions of many and great articles, the which require great examination, shall be taken before the justices of the bench, except that both parties desire that the inquisition may be taken afore some of the associates when they do come into those parts; so that from henceforth it shall not be done but by two justices, or one with some knight of the shire, upon whom the parties can agree. And such inquisitions shall not be determined by any justices of the bench, unless a day and a place certain be appointed in the shire, in presence of the parties, and the day and place shall be mentioned in a writ judicial by these words:

And when such inquests be taken, they shall be returned into the bench, and there shall judgement be given, and there they shall be inrolled. And if any inquisitions be taken otherwise than after this form, they shall be of no effect, except that an assise of darrein presentment, and inquisitions of quare impedit shall be determined in their own shire before one justice of the bench and one knight, at a day and place certain in the bench assigned, whether the defendant consent, or not, and there the judgement shall be given immediately. All justices of the benches

*sicut antiquitus habere consueverunt (15). Item ordinatum est, quod iusticiarii * ad assisas capiend' assignati non compellant juratores dicere præcise, si sit disseisina vel non, dummodo dicere voluerint veritatem facti, et petere auxilium iusticie. Sed si sponte velint (16, dicere, quod disseisina est, vel non, admittatur eorum veredictum sub suo periculo. Et de cætero non ponant iusticie in assisis, aut juratis aliquos jurat', nisi eos qui ad hoc prius fuerunt summoniti (17).*

from henceforth shall have in their circuits clerks to inroll all pleas pleaded before them, like as they have used to have in time passed. And also it is ordained, that the justices assigned to take assises shall not compel the jurors to say precisely whether it be disseisin, or not, so that they do shew the truth of the deed, and require aid of the justices. But if they of their own head will say, that it is disseisin, their verdict shall be admitted at their own peril. And from henceforth the justices shall not put in assises or juries any other than those that were summoned to the same at the first.

(2 Bulst. 160. 12 Rep. 31. 52. Kel. 109. pl. 30. 27 Ed. 1. stat. 1. c. 4. 12 Ed. 2. stat. 2. c. 4. Regist. 186. F.N.B. 240. b. Bio. Nisi prius, 31. 13 Rep. 42. The writ of *nisi prius*. Regist. ind. 7. F.N.B. 240. E. Raft. 437. 2 Salk. 454. 9 H. 3. stat. 1. c. 12, 13. Dyer, 135. 163. Dyer, 175. Raft. 99. 333. Plow. 92. Dyer, 173. 9 Rep. 11. 14 Ed. 3. stat. 1. c. 16.

This statute consisteth of many branches whereof we shall speak in their order: and first it is to be seen what mischiefs were before the making hereof, the principall whereof we shall touch.

1. Before the making of the statute of *Magna Charta*, assises were onely to be taken in the court of common pleas which was mischievous to the recognitors of the assise: it is provided by *Magna Charta*, that they shall be taken in the proper county once every year, and that remedy was too short, and therefore they are by this act to be taken oftner.

2. Another mischief was, that the justices of assise were not sometime but apprentices of the law, and a knight associate to them which oftentimes were favourable.

3. And if the recognitors of the assise had not given their verdict, the justices could not (before this act) have adjourned the record into the court of common pleas.

4. Also, if a forcin plea had been pleaded, or forein voucher had, they could not have adjourned it into the court abovesaid.

5. Before the making of this act, all jurors, together with the parties, came up to the kings higher courts of justice, where the cause depended, *et propter tantam, et intolerabilem populi nostri iacturam, non solum ad eorundem juratorum exonerationem, sed etiam ad celerem partibus in curia nostra placitantibus iustitiam exhibendam, &c.* And this is the first act that gave the writ of *nisi prius*.

6. Also before this act some justices did rule over the recognitors, to give a precise or direct verdict without finding the speciall matter.

Now the remedies do follow.

(1) *Assignentur de cætero duo iusticie jurati, coram quibus et non aliis, &c.*] Herchy it appeareth what an honourable opinion the law

27 E. 1. cap. 4.
York 12 E. 2.
c. 3.

law hath of the kings justices sworn, that they are *omni exceptione majores*.

But this branch hath been manifoldly altered, for by the statute of 27 E. 1. cap. 4. these inquisitions and recognitions were to be taken *coram aliquo justiciar' eorundem, coram quibus placitum deducium fuerit, associato uno milite comitatus illius, &c.*

By the statute of York, they are to be taken before one justice of the one place or the other, having associate to him, *un picde home de pais, chivalier, ou autre.*

But by the statute of 14 E. 3. they may be taken before any justices of the one bench or the other, or the kings serjant sworn, which is intended of any serjant at law, for that every serjant is sworn.

And this act is extended to the kings attorney, being joyned with one of the justices or serjants; and albeit the king make choice of some serjants to be of his counsell and fee, yet in a generall sense all be called the kings serjants, because they be all called by the kings writ.

(2) *Ad plus terre per annum.*] Hereby the former time given by Magna Charta is enlarged. [423]

These dayes are altered by later statutes.

By 27 E. 1. it is provided they shall be taken *tempore vacationis*, vide 14 E. 3.

(3) *Quindena sancti Johannis Baptiste.*] This return amongst others is taken away by the statute of 32 H. 8.

(4) *Gula Augusti.*] Gule of August. This is also mentioned in the statute of 27 E. 3, &c. the feast of S. Peter ad vincula is on this day, being the first day of August, as it appeareth in Pl. Com. where it is said, *Al feast de S. Peter en la gule de August.*

The reason why it is called *gula Augusti*, you may read in Durand, in his booke *De rationali divinarum, lib. 7. De festo sancti Petri ad vincula.*

This I have added, not out of any curiosity, but that the reader might understand what he reads, which hath been mine endeavour throughout all this work.

(5) *Statuant diem de reditu sue.*] That is, by proclamation in open court.

(6) *De termino in terminum adjournent assisas.*] See the exposition upon the statute of Magna Charta. Et vide lib. 4. fol. 4. Verons case, & lib. 8. fo. 57. Le countee de Rutlands case.

(7) *Per vocationem warranti.*] Forein pleas are taken within the equity of this act, and so are demurrers doubtful, and other pleas and proceedings, &c. as well before as after verdict.

In an assise, the tenant pleads a release made in a forein county, whereupon the record is adjourned into the court of common pleas; that court may graunt a *nisi prius* into the forein county, for albeit in this case the court of common pleas hath by this act *delegatam potestatem* for the trial of the release, yet all incidents thereunto are therewith graunted.

(8) *Per essonium.*] This must be intended of an essoin *ultra mare*, for the common essoin, or *de servitio regis* lieth not in this case.

(9) *Remittatur loquela.*] That is, the record of the assise, together with the originall writ shall be remanded to be taken, &c. in the proper county before the former justices.

27 E. 1. cap. 4.

12 E. 2. cap. 3.

14 E. 3. ca. 16.

Bro. Nisi prius, 37. See the form of the *pesta* hereafter in this chapter.

27 E. 1. & 14 E. 3. ubi supra.

32 H. 8. ca. 21.

27 E. 3. stat. 3. F.N.B. 62. i. Pl. Com. 316.

Mag. Chart. ca. 12.

Mag. Chart. c. 12. Br. adjorn. 29. 47 Ass. 1. 49 Ass. 23. 48 E. 3. 7. 22 Ass. p. 11.

Regist. 186.

42 E. 3. cap. 11.

(10) *Atterminentur etiam inquisitiones coram eis de aliis placitis, &c. in quibus est facilis examinatio, &c. Sed inquisitionem de grossis et pluribus articulis quæ magna indigeant examinatione, &c. nisi ambæ partes petant, &c.*] Upon this statute a writ in the Register is framed, *Quod inquisitiones, quæ magnæ sunt examinationis, non capiantur in patria, et de superfedendo, &c.*

(11) *In brevi de judicio in hæc verba.*] *Præcipimus tibi, quod venire facias coram justiciariis nostris apud Westm' in octabis sancti Michaelis, nisi talis et talis, tali die et loco ad partes illas venerint, 12, &c.*

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The judicial writ now in use hath [*prius*] before [*venerit*,] and therefore it taketh the name of *nisi prius*.

14 E. 3. ca. 16.
33 E. 3. attaint
77.

Although the statute of 14 E. 3. speak not of an attaint, yet is an attaint within it, for the effect of that ordinance is, that in all cases where a *nisi prius* is grauntable, it shall be graunted before justices of assise.

23 E. 3. 23.
24 E. 3. 23.
25 E. 3. 39.
14 E. 3. Nisi prius, 16.
F.N.B. 241. a.
32 H. 6. 9.
F.N.B. 241. a.
11 E. 3.
Vine 59.

Albeit this act be generall, yet a *nisi prius* shall not be graunted where the king is party, or where the matter toucheth the right of the king, without a speciall warrant from the king, or the assent of the kings attorney.

The duke of Exeter being plaintiffe in trespassse, for the duke a *nisi prius* was prayed, and it was denied, for that the duke was of great power in that county, and if triall should be had in the country, inconvenience might thereupon follow.

(12) *Et cum hujusmodi inquisitiones captæ fuerint, retournentur in bancis, et ibi fiat judicium, et irrotulentur.*] Herewith agreeth the statute of York *ubi supra*.

By the statute of 14 E. 3. cap. 16. the chiefe justice of that place shall return the record, and shall return the verdict under his seale.

The return of the justices is, *Ad quem diem hic venerunt partes præd', et justiciarii ad assisas coram quibus, &c. miserunt hic record' in hæc verba*; and this returne is called the *postea*, because the record beginneth thus: *Postea die et loco infra contentis coram* (and nameth the justices of assise) *justiciariis ipsius domini regis ad assisas in com' N. capiend' assignat' per formam statuti venerunt tam le pl' quam le def. &c.*

Livre de entries.
Rat. 101. Hil.
19 H. 7. Rot.
409. in com-
muni banco.
2 H. 7. 10.
simile. Dier. 5.
Mar. 163.

If one of the justices of assise die before the returne, a *certiorari* may be awarded out of the court of common pleas to the survivor to certifie the verdict; if both the justices die, the clerk of the assise may bring it in without a *certiorari*, or a *certiorari* may be awarded to the executors, or administrators of them to certifie the record.

Statute of York.
12 E. 2. c. 4.
14 E. 3. c. 16.
17 E. 3. 23.

But this act was defective, for hereby the justices of *nisi prius* might take verdicts and inquisitions; but they could not record non-suits of the demandant or plaintiffe, or defaults of the tenant or defendant, which was remedied by the statute of York.

Regula.

(13) *Et si omissa forma prædicta aliquæ inquisitiones capiantur, pro nullis habeantur.*] For the rule of law is, *non observata forma infertur annullatio actus*; but that rule is to be understood, *de essentiali forma*, and not *de accidentali*.

(14) *Excepto quod assise ultimæ præsentationis, et inquisitiones super quare impedit atterminentur in proprio com', &c. et ibi statim reddatur judicium.*] The reason of making of this branch was in respect of the daunger of laps, and therefore in favour of the patrons this clause

clause was added that the justices of *nisi prius* have power to give judgement in these two actions.

And albeit the words of this branch be, *et ibi statim reddatur judicium*, yet if the justices of *nisi prius* doe not give judgement, upon return of the *posse* judgement may be given by the court to which the return is made, for by these words the higher court is not restrained; and this branch giving to the justices of *nisi prius* power to give judgement, they have thereby power includedly, as incident, given to award execution, that is, a writ to the bishop, but that writ is not retournable; but after the record be returned into the common bench, if the former writ be not executed, that court may graunt a writ *sicut alias*, returnable into that court, all which is worthy of singular observation.

4 Mar. Dier,
135. 9 El. Dier,
260.

Incident.

[425]

And justices of *nisi prius* have power to inquire of incidents.

18 E. 3. 49. 50.

Also justices of *nisi prius* may amerce jurors, and demand them upon a pain, and also punish them for misdemeanors done in their presence, which are in despite of the king, and thereupon make proces, and what lieth in aide and furtherance of the businesse they may record, likewise they may record a prayer to be received.

17 E. 3. 23.

(15) *Habeant de cætero omnes justiciarii de bancis in itineribus clericos irrotulantes omnia placita coram eis placitata, sicut antiquitus habere consueverint.*] Hereby it appeareth that the justices of courts did ever appoint their clerks, some of which after by prescription grew to be officers in their courts; as here it is put for example, that the justices of the benches in their circuits had clerks that enrolled all pleas pleaded before them as aunciently they used to have, that is, as by the common law.

Dier 1 Eliz. 175.

Now the cause of the making of this branch was, that the king was informed that he might erect offices for entring and inrolment of records in his courts of justice, and specially before justices of assise, which this branch declareth to belong to the justices, and that they had enjoyed the same of auncient time, that is, by the common law.

And the reason thereof is twofold. 1. For that the law doth ever appoint those, that have the greatest knowledge and skill, to performe that which is to be done. 2. The officers and clerks are but to enter, inroll, or effect that which the justices doe adjudge, award, or order, the insufficient doing whereof maketh the proceeding of the justices erroneous, then the which nothing can be more dishonourable and grievous to the justices, and prejudiciall to the party; therefore the law, as here it appeareth, did appropriate to the justices the making of their owne clerks and officers, and so to proceed judicially by their own instruments: and that this was the common law, the king cannot graunt the office of the shire or county clerk, (who is to enter all judgements and proceedings in the county court) for that the making of the shire clerk belongeth to the sheriffe by the common law, as in Mittons case it appeareth, *et sic de cæteris*.

Lib. 4. fol. 32.
Mittons case.

(16) *Justiciarii ad assisas capiend' assignat' non compellant juratores dicere præcisè si sit diseisina, vel non, dummodo dicere voluerint veritatem facti, et petere auxilium justic'. Sed si sponte voluerint, &c.*] The first question upon this branch was, whether in case of assise, if the issue were joyned upon a collateral matter out of the

Li. 9. f. 1. 11. 13.
Dowmans case.

point

See the first part
of the Institutes,
sect. 366, 367.

45 E. 3. 20. 42 E.

3. 1. 40 E. 3. 2.

41 E. 3. 10. 47

E. 3. 19. 16 E. 3.

verdict 21. 9 H.

7. 3. Dier 28 H.

8. 32. 2 Mar.

115. 9 El. 260.

11 El. 279. 13 El.

30. 32 H. 8. 47.

Pl. Com. 92.

3 E. 3. Cor. 284.

286. 43 aff. 31.

44 E. 3. 44.

26 H. 8. 5.

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point of the assise, whether upon this speciall issue the jury might give a speciall verdict.

2. The second question was, whether it did extend to all other actions, or onely to these actions wherein the defendant or tenant might plead a generall issue.

3. Thirdly, whether in all actions the jury might give a speciall verdict upon a special issue, upon an *absque hoc*, or otherwise

In the end it hath been resolved, that in all actions reall, personall, and mixt, and upon all issues joynd generall or speciall, the jury might finde the speciall matter of fact pertinent, and tending onely to the issue joynd, and thereupon pray the discretion of the court for the law: and this the jurors might doe at the common law, not onely in cases betweene party and party, whereof this act putteth an example of the assise, but also in pleas of the crown at the kings suit, which is a proove of the common law, for if this act had made a new law, and that other like cases betweene party and party had beene taken by equity, yet the king had not beene bound thereby: and note the next precedent clause of this act, and the subsequest are both in affirmance also of the common law.

(17) *Et de cætero non ponant justic' in assis, aut juratis aliquos juratores, nisi eos qui ad hoc prius fuer' summoniti.*] Where this branch saith *non ponant justic' in assis*, the meaning is that the justices shall not suffer the sheriffe to put into the pannell any men which were never summoned: for before this act if the sheriffe had made a pannell, and the jurors had not appeared, the sheriffe would have impannelled others of the same county who were never summoned, which was a wrong to them that were so newly returned, and is now prohibited by this act, whereupon any so unduly returned may have his action against the sheriffe, for this act is made for the reliefe of them that were so unduly returned.

Lib. 9. fol. 13.
Dowmans case.

C A P. XXXI.

CUM aliquis implacitat' (1) coram aliquibus justic' (2), proponat exceptionem (3) et petat quod justic' eam allocent, quam si allocare noluerint, si ille qui exceptionem proposuerit, scribat illam exceptionem, et petat, quod justic' sigillum suum apponant in testimonio, justiciarii apponant sigilla sua (4). Et si unus apponere noluerit, apponat alius de societate. Et si forte ad querimoniam de facto justiciariorum venire fac' dominus rex recordum coram eo, et si illa exceptio non inveniatur in rotulo, et querens ostendat exceptionem scriptam sub sigillo (5) justic' appenso, mandatur

WHEN one that is impleaded before any of the justices doth alledge an exception, praying that the justices will allow it, which if they will not allow, if he that alledged the exception do write the same exception, and require that the justices will put to their seals for a witness, the justices shall so do; and if one will not, another of the company shall. And if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff shew the exception written,

mandatur justiciario, quod sit ad certum diem (6) ad cognoscendum sigillum suum, vel ad dedicendum. Et si justiciarius sigillum suum dedicere non possit, procedatur (7) ad judicium secundum illam exceptionem, prout admittend' esset vel cassand'.

ten, with the seal of a justice put to, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal. And if the justice cannot deny his seal, they shall proceed to judgement according to the same exception, as it ought to be allowed or disallowed.

(9 Rep. 13. Kelyng, 15. Regist. 182.)

At the common law, before the making of this act, a man might have had a writ of error for an error in law, either *in redditione judicii, in redditione executionis, or in processu, &c.* and this error in law must be apparent in the record, &c. For the writ of error saith, *quia in recordo et processu, &c. error intervenit manifestus, &c.* Or for error in fact, by alledging matter out of the record, as death of either party, &c. before judgement: now the mischief before this statute was, that when the demandant or plaintiffe, or the tenant or defendant did offer to alledge any exception, (as in those dayes they did *ore tenus* at the barre) praying the justices to allow it, and the justices over-ruling it so as it was never entred of record, this the party could not assign for error, because it neither appeared within the record, nor was any error in fact, but in law, and so the party grieved was without remedy, for whose relief this statute was made.

[427]

(1) *Cum aliquis implacitatur.*] This act doth extend aswell to the demandant or plaintife, as to the tenant or defendant in all actions reall, personall, and mixt; and regularly it extendeth not to a stranger to the record, which is not to come in lieu of the tenant, &c. For example, if the bailife of a franchise demand consfans, and the justices over-rule the same, he cannot pray the justices to infeas a bill, because he is no party to the record: but yet one that offereth to be received, and is denyed, albeit he be none of the parties to the writ, yet because he is privie in estate, and to be *in loco tenentis*, he shall have the benefit of this act; and so it is of the vouchee, though he be no party to the writ, because he is *in loco tenentis*.

F.N.B. 21. n. & 22. a.

20 E. 3. Consfans 46.

17 E. 3. 23. a.

(2) *Coram aliquibus justiciariis.*] Albeit the letter of this branch seemeth to extend to the justices of the com' pleas only, by reason of these words, *et si forte ad querimoniam de facto justiciarius venire fac' dominus rex recordum coram eo*, (which is by writ of error into the kings bench) yet that is put but for an example, and this act extendeth not onely to all other courts of record (for upon judgements given in them a writ of error lyeth in the kings bench) but to the county court, the hundred, and court baron, for therein the judges were more likely to erre; and albeit, of judgements given in them a writ of error lyeth not, but a writ of false judgement in the court of common pleas, yet the case being in the same, or greater mischief, the purview of this statute doth extend to those inferiour courts.

(3) *Preponat exceptionem.*] This extendeth not onely to all pleas dilatory and peremptory, &c. and (as hath been said) to prayers to be received, oier of any record or deed, and the like: but also to all challenges

11 H. 4. 52. 65.

9 Aff. p. 8. 16 E.

3. Quare non admittit 3. Regist. 182. 21 E. 4. 26.

21 E. 4. 12. b.
F.N.B. 21. n.

challenges of any jurors, and any material evidence given to any jury, which by the court is over-ruled.

Regist. 182.

(4) *Iusticiarii apponant sigilla sua.*] Here is an expresse commandment given to the justices; and yet if one refuse, and any of the other infeas the bill, it sufficeth, but if they all refuse, it is a contempt in them all; for it lyeth not in the power of the justices that denyed to perform the purview of this act, to take advantage of their own wrong, and the party grieved may have a writ grounded upon this statute to the justices, commanding them to put their seals *juxta formam statuti, et hoc sub periculo quod incumbit nullatenus omittatis.*

11 H. 4. 52. 63.
Regist. ubi supr.
F.N.B. 22. a.

And though no time be appointed by this act, when the justices shall put their seals, the party must pray the same before judgement; but if they deny it, then may they be commanded after judgement to put their seals, and then the putting of their seals after judgement shall be sufficient.

11 H. 4. ubi supr.

(5) *Et querens offendat exceptionem scriptam sub sigillo.*] Albeit the party grieved be dead, yet his heirs or executors, &c. according to the case, shall have a writ of error upon this bill of exception.

In this case the plaintife can alledge no diminution, for he must hold himself to the matter in the bill sealed; and if it be not there, it was his folly to omit it.

11 H. 4. 52. 63.
[428]

(6) *Mandetur iusticiario quod sit ad certum diem.*] Albeit some have holden, that the justices may bring in the bill under their seal, and acknowledge it, yet the surer way is to follow the order prescribed by this act.

If the justice dye, yet shall there a *scire facias* go against his executor or administrator; for the death of the judge, which is the act of God, cannot prejudice the party, nor make the purview of this statute to be of no force.

1. Part of the
Institutes, sect.
102.

As if a man be outlawed, and at the time of his outlawry he was beyond the seas in war in the kings service, and brings a writ of error to reverse his outlawry, and obtains a certificate of the marshall of the kings host under his seal (as he ought to do) in this case notwithstanding the marshall dye, yet may he assign the same for error, and upon shewing of the certificate have a *scire fac* to the executors or administrators of the marshall.

(7) *Et si iusticiarius sigillum suum dedicere non possit, procedatur, &c.*] On the other side, if the judge deny his seal, then may the plaintife in the writ of error take issue thereupon, and prove it by witnesses; for it lyeth not in the judge in this case to frustrate this excellent law made for advancement of justice and right.

Booke of En-
tries, Raft. 275,
323.
Vet. N.B. 54.

For the order of proceeding herein according to this act, see the book of entries.

C A P. XXXII.

CUM viri religiosi, et aliæ personæ ecclesiasticæ implacitent aliquem, et implacitatus (1) fecerit defaultam (2), ob quam tenement' amittere debeat: quia justiciar' hucusque tenuerunt, quod si implacitatus fecerit defaultam per collusionem, ut cum petens occasione statuti per titulum doni, vel alterius alienationis, seisinam de tenement' consequi non posset, per illam defaultam consequeretur, et sic fieret fraus statutio: ordinatus est per dominum regem, et concessum in hoc casu, quod postquam defaulta facta fuerit, inquiratur per patriam, utrum petens habeat jus in sua petitione, vel non. Et si comperitum fuerit, quod petens jus habuerit (3), procedatur ad iudicium (4) pro petente, et recuperet seisinam suam. Et si jus non habuerit, incurratur tenement' proximo domino feodi, si illud petat infra annum (5) a tempore inquisitionis captæ. Et si infra annum non petat, superiori domino incurratur, si petat infra dimidium annum post illum annum. Et sic habeat quilibet dominus post proximum dominum, spacium dimidii anni ad petendum successivè, quousque perveniat ad regem, cui ad ultimum pro defectu aliorum dominorum tenementum incurratur. Et ad calumniandum juratores inquisitionis, admittantur quicumque capitales domini feodorum (6), et similiter pro rege qui calumniare * voluerint (7.) Et remaneat terra, postquam iudicium datum fuerit in manu domini regis quousque tenent' per petentem, vel per aliquem capitalem dominum distracionetur, et oneretur vic' ad respondend' inde ad seccarium.

* [429]

WHEN religious men and other ecclesiastical persons do implead any, and the party impleaded maketh default, whereby he ought to leese the land, forasmuch as the justices have thought hitherto, that if the party impleaded make default by collusion, that where the demandant, by occasion of the statute, could not obtain seisin of the land by title of gift, or other alienation, he shall now by reason of the default, and so the statute is defrauded; it is ordained by our lord the king, and granted, that in this case, after the default made, it shall be inquired by the country, whether the demandant had right in the thing demanded, or no. And if it be found that the demandant had right in his demand, the judgement shall pass with him, and he shall recover seisin; and if he hath no right, the land shall accrue to the next lord of the fee, if he demand it within a year from the time of the inquest taken; and if he do not demand it within the year, it shall accrue to the next lord above, if he do demand it within half a year after the same year; and so every lord after the next lord shall have the space of half a year to demand it successively, until it come to the king, to whom at length, through default of other lords, the lands shall accrue. And to challenge the jurors of the inquest, every of the chief lords of the fees shall be admitted, and likewise for the king, they that will shall challenge; and after the judgement given, the land shall remain clear in the king's hands, until it be dereigned by the demandant, or some other chief lord, and the sheriff shall be charged to answer therefore at the exchequer.

* Statut. de Religiosis, anno 7 E. 1. (Fitz. Coll. 1. 2. 4. 5. 6. 7. 9. 10. 11. 22. 24. 25. 26. 27. 32. 40. 42. 46. 10 H. 7. l. 3. 11 Ed. 3. stat. 3. c. 3. 9 H. 3. stat. 1. c. 36.)

Magna Chart.
cap. 36.
Stat. de Religio-
nis, 7 E. 1.
33 H. 6. 25.

Notwithstanding the statute of *Magna Charta*, and the statute of *de religiosis*, anno 7 Edw. 1. yet this evasion was found out, that religious and ecclesiasticall persons did recover lands by default; which, albeit it were by consent and collusion, yet the justices did hold that these religious and ecclesiasticall persons came not to the land *per titulum doni, vel alienationis*, nor was within the generall words of the statute of 7 Edw. 1. *Aut alio quovismodo, arte, vel ingenio sibi appropriare præsumat*: for that recoveries being prosecuted in course of law were by law presumed to be just and lawfull, it was holden by the justices, that they were not within the former statute; and yet these recoveries were done *in fraudem legis*, for remedy whereof this statute was made.

2 E. 3. 10. 10 E.
3. 17. 21 E. 3. 5.
24 E. 3. 27. 38
E. 3. 12. 27. 3 E.
4. 12. 13. 1 E. 2.
Collusion 11.
7 E. 3. ibid. 17.
16 E. 3. ibid. 21.
34 E. 3. ibid. 46.
20 H. 6. 38.

(1) *Et implacitatus*.] All actions brought for any lands or tenements, wherein a free-hold, inheritance, or a long term is recovered, as within this statute, as *præcipes quod reddat, quare impedit, droit de gard, ejectiōne firmæ, quare ejecit infra terminum, warrantia chartæ, convenit* to levie a fine, execution *per elegit*, statute merchant, or statute staple, &c.

This act doth extend to them that are no parties to the writ, as to the vouchee, and tenant by receipt and the like.

5 E. 2. Collus. 19.
2 E. 3. 18.
6 E. 3. 23. 25.
19 E. 3.
Collusion 18.

And this statute doth extend by equity when the abbot, &c. is tenant or defendant, as when a writ of right is brought against an abbot, &c. and after the mise joyned, the demandant maketh default, and is nonsute, the collusion shall be inquired, and this case wherein the abbot is tenant is within the same mischief, and therefore within the equity of this law: and so it is if a *quare impedit* be brought against a prior of the church of D. and the plaintiff become nonsute, the defendant shall recover the presentment; and the collusion shall be inquired.

(2) *Fecerit defaultam*.] This act doth not extend onely, according to the letter, to recoveries by default, but to all manner of recoveries by verdict, or otherwise, if they be had by collusion.

Regist. judic.
16. 17.

If it be by default, then a judicall writ called a *quale jus* grounded upon this statute is awarded, which writ consisteth upon five parts:

1. It reciteth the recovery.

2. The doubt of the fraud, *et quia dubitatur de fraude inter eos prælocuta contra statutum*.

20 E. 3. Collu-
sion 34.

3. A commandement to the sherife to return a jury, *præcipimus tibi quod venire fac' coram justiciari' nostris apud Westmonast' duodecim, &c.* the charge of the jury is *ad recogn' super sacramentum suum hæc tria*; 1. *Quale jus idem abbas habuit in prædict' messuagio*: 2. *Quis predecessorum fuit inde seistus ut de jure ecclesie sue præd'*: 3. *Quantum illud messuagium valet per annum*.

4. The fourth is another commandement to the sherife, *et interim messuagium illud in manum nostram capias, &c. et quod de exitibus ad seaccarium nobis respondeas*.

5. The sherife is commanded, *et scire facias capitalibus dominis feodi illius mediatis, et immediatis, quod tunc sint ibi audituri juratum illam, si voluerint*.

Which writ I have the more at large rehearsed, for that it giveth a great light to all the parts of this act.

And it is to be observed, that if the jury finde that his predecessor was seised of it in his demesne as of fee in the right of his church, before

before the said statute *de religiosis*, anno 7 E. 1. this is a good verdict for the demandant without finding of any license; for though there were no license, the alienation was good: but if they finde that his predecessor was seised after the statute, then they ought to finde a license, or otherwise the land belongeth to the lord or king.

The value of the land is inquired of, because the issues thereof are to be by this act answered to the king.

If there be an issue joyned in the action brought by the abbot, the jury shall not onely inquire of the issue, but of the collusion, but as concerning the collusion, it is but an inquest of office, whereof no attaint lyeth.

If a recovery by verdict were not within the purview of this act, such an issue of disadvantage might be joyned, and so feint evidence might be given, as this statute should be of little force.

And if the jury do not inquire of the collusion, so as the abbot, &c. recover by verdict, yet the collusion shall be inquired of by a speciall writ, and not by a *quale jus*.

If an abbot bring an assise, and the tenant plead a forein release, they of the forein county cannot inquire of the collusion, but a speciall writ shall be granted.

If the tenant appear, and confesse the action, or judgement be given upon a *nihil dicit*, or a departure in despite of the court, these also are within this statute, and the collusion shall be inquired, and so if a recovery be had upon a demurrer in law, that recovery is also within the equity of this statute.

In some case no collusion shall be inquired at all, as if a person bring a *juris utrum*, and the jury finde that the land is the right of the church, this sufficeth without inquiring of the collusion.

(3) *Et si compertum fuerit quod petens jus habuerit.*] This is either by jury upon triall of the issue, or by *quale jus*, if the tenant make default.

(4) *Procedatur ad iudicium.*] Hereby it appeareth that the *quale jus* should be sued out after the default, and before judgement, and so it is said the use hath been; and if the collusion be found, the lord, &c. shall enter, though judgement be never given.

But yet if judgement be given upon the default, yet may the *quale jus* be sued out, and so it appeareth by the Judiciall Register, and many other authorities, but execution shall cease untill the collusion be inquired.

In a writ of right, if judgement shall be given for the abbot, &c. the collusion shall be inquired; for albeit the judgement shall be given between them, yet the lord by this statute shall enter: and so it is of a recovery by default in a *cessavit*.

(5) *Et si jus non habuerit, incurrat tenementum proximo domino feodi, si illud petat infra annum, &c.*] Here be the certain times appointed when the lords mediate and immediate shall enter, whereof sufficient hath been said in the exposition of the statute *de religiosis*, 7 E. 1.

(6) *Et ad calumniandum juratores inquisitionis, admittantur quicunque capitales domini feodorum.*] Hereupon, as hath been said, the sherife shall warn the lords mediate and immediate to appear and take their challenges,

13 E. 3. Collu-
sion 32. 16 E. 3.
ibid 42. 34 E. 3.
ibid. 40.
20 H. 6. 38.

20 H. 6. 38.
Stamf. Prærog.
84. b.
38 E. 3. 12. 43
E. 3. 8. 50 E. 3.
22. 14 Aff. 13.
5 E. 3. 29. 6 E.
3. 11. 20 H. 6.
38. 33 H. 6. 25.
6 R. 2. Collu-
sion 40.
33 H. 6. 25.

6 E. 3. 11.
17 E. 3. 5.

29 E. 3. 35.
6 R. 2. Collu-
sion 40.
31 H. 6. 10.

Kelwey 134.

5 E. 3. 29.

Regist. Judic.
16, 17.

34 E. 3. Collu-
sion 45. 13 E. 3.
ibid. 28. 12 E. 3.
Judgement 163.
4 E. 3. 8. Regist.
Judic. 16, 17.

42 E. 3. 3.

If any of the lords mediate or immediate be within age, in respect of these words, * *quicumque domini feodorum*, the court will advise whether any thing shall be done to his prejudice, during his minority.

Stat. de Inquis.
anno 33 E. 1.

(7) *Et similiter pro rege qui clamare voluerit.*] The king is alwayes (in judgement of law) present in court, and therefore any man may challenge for the king, but by the statute of 33 E. 1. they which challenge for the king must shew a cause certaine, and the truth thereof is to bee tried.

Observe well what exposition hath beene made of this act, and how the judges extended the same by equity, for otherwise the churchmen by advice of their learned councell (whereof they had the best) would have had some evasion or other out of the letter of the law.

See the exposition before of the statute *de religiosis*, anno 7 E. 1.

C A P. XXXIII.

QUIA multi tenentes erigunt cruces (1) in tenementis suis (2), aut erigi permittunt (3), in præjudicium dominorum suorum (4), ut tenentes per privilegium templariorum et hospitaliorum (5) tueri se possent contra capitales dominos feodorum: statutum est, quod hujusmodi ten' capitalibus dominis, aut regi incurrantur. Eodem modo (6) quo statuit alibi de tenementis alienatis ad manum mortuam.

FORASMUCH as many tenants set up crosses, or cause to be set up in their lands, in prejudice of their lords, that tenants should defend themselves against the chief lords of the fee, by the privileges of templars and hospitalers; it is ordained, that such lands shall be forfeit to the chief lords, or to the king, in the same manner as is provided for lands aliened in mortmain.

Fleta, l. 2. cap. 43. Lib. 5. cap. 34. Doct. & Stud. li. 2. ca. 34. & 46. Rot. Pat. 2 E. 3. Rot. clauf. 18 E. 3.

18 H. 1.

For the better understanding of this statute, it is to be knowne that the order of the templers, otherwise knights of the temple being men professed, were by Gelasius the pope founded anno Domini 1117, which was anno 18 H. 1.

These were called *templarii*, because they were first founded in some of the edifices adjoining and belonging to the temple, and had the charge and keeping of the lords sepulchre, and not onely entertained pilgrims that came to see the sepulchre, &c. but in their armour conducted christians that had a desire to see the city of Jerusalem, and other places in the land of Palestine, and to guard them from the Saracens and infidels.

Soone after, viz. anno Domini 1120, which was in anno 21 H. 1, the hospitallers, commonly called *milities Sancti Johannis Jerosolymitani*, being professed friers of S. John of Jerusalem, under the rule of S. Augustine, were founded, Honorius then being pope, and they were called *hospitularii*, hospitallers, because they had the care of hosting and providing hospitals for pilgrims, &c. travelling to

to Jerusalem, &c. and for their safe-conduct against Saracens and infidels. These two orders, (but especially the templers) did so overspread throughout christendome, and so exceedingly increased in possessions, revenues, and wealth, and specially in England, as you will wonder to reade in approved histories, and withall obtained so great and large priviledges, liberties, and immunities for themselves, their tenants and farmers, &c. as no other order had the like.

At the counsell of Vienna holden *anno Domini* 1311, which was *anno* 4 E. 2. *Clemens quintus* then being pope, the order of the templers was by that counsell dissolved throughout all Christendome, and their possessions and revenues here in England given to the hospitallers by act of parliament, *anno* 17 E. 2.

But the hospitallers continued here in England till an act of parliament made in 32 H. 8. by which act they were dissolved, so as albeit both these orders mentioned in this act are dissolved, and therefore this act may seeme to be obsolete and out of use, yet will we not omit the exposition of it for two causes; 1. for that we have hitherto omitted not one; and 2. it may serve for very good use, as hereafter shall appeare.

(1) *Erigunt cruces.*] The reason wherefore crosses were erected, was, for that the knights of both the said orders were *cruce signati*, and because that was the ensigne of their profession, and for that their tenants enjoyed great priviledges, to the end they might be known to be the tenants of the said orders, and thereby freed from many duties and services which other tenants were subject unto, did erect crosses upon their houses; and many tenants of other lords perceiving the state and greatnesse of the knights of both the said orders, and withall seeing the great priviledges their tenants enjoyed, did set up crosses upon their houses, as their very tenants used to doe, to the prejudice of their lords.

(2) *In tenementis suis.*] The crosse was erected upon their houses, but both the house and lands holden by one tenure were forfeited to the lord, and therefore the act saith, *in tenementis suis*.

(3) *Aut erigi permittunt.*] This word [permit] or [suffer] hath in the law two significations; first, where he that suffereth it, is party, and then it is equivalent to his owne act; as if a man suffereth a recovery against him, and the like: the other signification is when a stranger doth the act whereunto he is not party; as here if a stranger of his own head erecteth a crosse upon the tenants house, if after notice the tenant doth suffer it, this is a permission within this act; even as in waste in houses, if it be done by a stranger, the tenant must answer for it, if he repaire it not before the action brought; so if after notice the tenant doth not put down the crosse, but doth by colour thereof any thing to the prejudice of the lord, he is within this statute.

(4) *In præjudicium dominorum suorum.*] Somewhat must be done to the prejudice of the lord, for if the tenant erecteth, or suffereth to be erected a crosse upon his house, this is no forfeiture of his tenancy; but if after the erection of the crosse, he claimeth and putteth in ure any of the priviledges of either of the said orders against the lord to his prejudice, then is the tenancy forfeited.

(5) *Per privilegium templariorum et hospitaliorum.*] The tenants of the knights of both these orders enjoyed great priviledges, as

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Council of
Vienna, anno
Dom. 1311.
4 E. 2.
Kelwey, 6 H. 8.
fol. 163, 170.
Anno 17 E. 2.
Ver. Mag. Chart.
fol. 42. second pt.
5 E. 3. 36.
35 H. 6. 46.
32 H. 8. ca. 24.

21 H. 7. 34.

Regist. f. 20. 21.

See hereafter,
ca. 43.

well against the king, as against the other lords; as to be free from tenths and fifteens to be paid to the king, to be discharged of purveyance, that they should not be sued for any ecclesiasticall cause before the ordinary, *sed coram conservatoribus privilegiorum suorum*; also of ancient time they claimed that a felon might take such houses having such crosses for his safety, as well as any church, and many others: now if a crosse be erected, and any of these, or other privileges claimed and put in ure by the tenant, &c. then was his land forfeited to the lord of whom the land in truth was holden.

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If after the crosse levied, the prior of S. John of Jerusalem had distrained for rent or service, and the tenant had acknowledged the tenure of him, the very lord might enter by the purview of this statute, and so if the tenant doe prove any will whereof he is made executor before the conservator of the privileges, the lord may enter, *et sic in similibus*.

(6) *Eodem modo.*] This is an act of reference as well to the statute of *rel'gious*, anno 7 E. 1. as to the 32 chapter of this parliament of Westm' the second; and therefore if the king take benefit of this act, he ought to graunt the lands over in such sort, as is prescribed by the said act of 7 E. 1.

And albeit the state of the tenancy was not hereby changed, as in the case of the mortmaine, (whereunto this act referreth) yet such were the height, power, and greatnesse of these orders, that this act doth put the matter prohibited by this act in equipage, with an alienation in mortmaine.

C A P. XXXIV.

PURVIEW est, que si homo ravist
feme espouse, damaselle, ou auter
feme desormes, per la ou el ne soit as-
sentus, ne avant, ne apres (1), eyt
judgement de vie et de membre (2). Et
ensment per la ou home ravist feme,
d'une espouse, damaselle, ou auter feme
a force, tout soit que el soy assent apres,
eyt tiel judgement come devant est dit,
sil soit attaint a le sult le roy (3), et la
eyt le roy sa sult. De mulieribus (5)
abduclis cum bonis virorum (6) suo-
rum, habeat rex sectam de bonis sic as-
portatis (4.) Et si uxor sponte reli-
querit virum suum, et abierit (8), et
morietur cum adultero (9) suo, amittat
in perpetuum actionem petendi dotem
suam (7), que ei competere possit de
ten' viri sui, si super hoc convincatur,
nisi vir suus sponte, et absque coher-
tione ecclesiastica eam reconciliet, et je-
cum

IT is provided, that if a man from
henceforth do ravish a woman mar-
ried, maid, or other, where she did not
consent, neither before nor after, he
shall have judgement of life and of
member. And likewise where a man
ravisheth a woman married, lady,
damosel, or other, with force, although
she consent after, he shall have such
judgement as before is said, if he be
attainted at the king's suit, and there
the king shall have the suit. And of
women carried away with the goods
of their husbands, the king shall have
the suit for the goods so taken away.
And if a wife willingly leave her hus-
band, and go away, and continue with
her advouterer, she shall be barred for
ever of action to demand her dower,
that she ought to have of her hus-
band's lands, if she be convict there-
upon,

cum cohabitare permittat (10), *in quo casu restituatur ei actio. Quia monialiam à domo sua abducatur, licet monialis consentiat, puniatur per prisonam trium annorum, et satisfaciatur domui à qua abducta fuerit, competenter* (11): *et nihilominus readimatur ad voluntatem regis* (12).

upon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action. He that carrieth a nun from her house, although she consent, shall be punished by three years imprisonment, and shall make convenient satisfaction to the house from whence she was taken, and nevertheless shall make fine at the king's will.

31 E. 1. Endowment 31. (3 Ed. 1. c. 13. 6 R. 2. c. 6. Regist. 57. 2 Roll. 247. 9 Ed. 4. f. 26. Bre. Coron. 203. Dyer, 256. Fitz. Dower, 41. 72. 94. 119. 153. Fitz. Act. sur le stat. 12. 37. 1 Inst. 32.)

(1) *Parvieu est, que si home ravist feme espouse, damejelle, ou autre feme desormes, per la ou el ne soit assentus, ne avant, ne apres, eyt judgement de vie et de membre.*] This clause is intended of an appeale to be brought by the party ravished, for if she give consent either before or after, she shall have no appeale, but if shee consented neither before nor after, then shee shall have an appeale of rape, and there is no law that gives a woman an appeale of rape but this.

13 E. 3. Coron. 122.

Hereby the auncient law concerning the election given to her that is ravished is taken away. *Vide* Westm. 1. cap. 13.

Afterwards by the statute of R. 2. a greater punishment is inflicted upon the party ravished, if she after consent to the ravisher, *viz.* that as well the ravished as the ravisher should be disabled to challenge inheritance, dower, or joynt-feeoffement, &c. and that the next of blood should enter, &c.

And moreover the husband of her that is so ravished and after gives her consent, or if she have no husband, her father, or other next of her blood shall have the appeale of rape, wherein no wager of battell shall be allowed; so as this act of R. 2. gave an appeale in case were no appeale lay before, and also to other persons, so as the woman that never consented may have her appeale upon this statute, and if she give consent afterwards, then the appeale of rape is given by the statute of 6 R. 2.

If a woman be ravished by her next of kin, and consenteth to him, and hath neither husband nor father, the next of kin to him shall have the appeale, for he hath disabled himselfe by the rape, whereby he becomes a felon.

(2) *Judgement de vie et de membre.*] That is to say hee shall be attainted of felony.

In the appeale being the suit of the party, the pardon of the king doth not discharge the party, as it doth upon the indictment at the suit of the king.

(3) *Et ensement per la ou home ravist feme, &c. a force, tout soit que el assent apres, eit tiel judgement come est avandit sil soit atteint a le fute le roy, &c.*] Hereby it appeareth that the first clause is to be intended of the suit of the party, this branch providing expressly for the suit of the king.

See the first part of the Institutes, sect. 190.

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6 R. 2. c. 6. 5 E. 4. 6. Lo. 5 E. 4. 58. 1 H. 6. 1. 9 H. 7. 25. Pl. Com. 45. li. 3. fol. 61. Shelleyes case. 11 H. 4. 13. 1 M. 6. 1.

28 H. 6. Coron. 459.

De frangent. prisonam. 1 E. 2. 14 E. 3. cap. 6. 9 E. 4. 26. 22 E. 4. 23. Eroke Coron. 203.

W. 1. c. 13. 13
E. 2. Utlag. 49.
First part of the
Instit. sect. 190.
7 H. 3. Trespasse
244. Temps E.
1. ibid. 241.

Regist. 97. a.
F. N. B. 89. c.
42 Aff. p. 16.
Dier 256.

Regist. ubi sup.
14 H. 6. 2.

43 E. 3. 23. 44
Aff. 13. 7 R. 2.
Trespasse 206.

47 E. 3. Action
sur le stat. 37.

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43 E. 3. 23.

43 E. 3. ubi supr.

Fleta, li. 5 c. 22.
Brit. ca. 109.
Mirror, c. 5. § 5.

1 Part of the In-
stitutes, sect. 36.
Custumier de
Noim. ca. 101.

43 Ed. 3. 19.

See the exposition of the 13 chapter of Westm. 1. and the first part of the Institutes, sect. 190.

(4) *De mulieribus abductis cum bonis virorum suorum habeat rex sectam de bonis sic asportatis.*] At the common law the husband might have had an action of trespass, *de uxore abducta cum bonis viri.*

This is also prohibited by the statute of Westm. the 1. cap. 13. and a further punishment inflicted then was at the common law, and therefore in the original writ, *de uxore abducta cum bonis viri*, it is concluded *contra formam statuti in hujusmodi casu proviso*, meaning the said statute of Westm. 1. for this act of Westm. 2. extendeth onely to the suit of the king: and if the writ be brought at the common law omitting the words, *contra formam statuti*, then it is *Si A. fecerit, &c. tunc pone, &c. quod sit, &c.* but if *contra formam statuti* be added, then the writ is, *Si A. fecerit, &c. tunc attachies B. ita quod eum habeas, &c.*

And albeit the words be, *habeat rex sectam*, yet may the husband also have his action, as is aforesaid.

(5) *De mulieribus.*] That is to say *uxoribus*, for of auncient time *mulier* was taken for a wife.

If the wife be taken away, and after be divorced, or if shee die, yet the husband shall have his action, *de uxore abducta cum bonis viri*; for in this action he shall not recover his wife, but damages. And he cannot have an action for taking her away as his servant, because the law gives him an action in another forme.

If the wife be *infra annos nobiles*, viz. under the age of twelve years at the time of taking away, some have holden that the husband shall not have a writ *de uxore abducta cum bonis viri*. But I hold the law is to the contrary, for she is *uxor* untill disagreement.

(6) *Cum bonis virorum.*] The plaintife must in his count shew the goods in certain.

Albeit the words of the writ be *rapuit*, yet here it is taken for a violent taking away, and not when carnall knowledge is had, so as this action may be brought against women as well as men.

(7) *Et si uxor sponte reliquerit virum suum, & abierit, & moretur cum adultero, amittat in perpetuum actionem petendi dotem suam, &c. nisi vir suus sponte, & sine coactione ecclesiastica eam reconciliet, & secum cohabitare permittat, &c.*] In this case of elopement, and remaining with the adulterer, &c. the wife could not be barred of her dower by the common law, no though a divorce were sued and had for the said adultery, as you may read in the first part of the Institutes, sect. 36.

(8) *Si sponte reliquerit, & abierit, & moretur cum adultero, &c.*] Albeit the words of this branch be in the conjunctive, yet if the woman be taken away not *sponte*, but against her will, and after consent, and remain with the adulterer without being reconciled, &c. she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation, that is the bar of the dower: see more of these words (*reliquerit & abierit*) in this chapter.

If the wife goeth away with her husbands agreement and consent with A. B. if after A. B. commit adultery with her, and she remain with him without reconciliation, she shall be barred of her dower by this branch; whereof you shall read in an ancient parliament

parliament roll a rare and strange case, which was the first judgement that I finde given upon this branch, and the judgement was given in parliament; and the case, which I have taken out of the record it self, was this :

Sir William Paynel knight, and Margaret his wife did demand the third part of the mannour of Torpul, as the dower of the said Margaret after the death of John de Camoys her first husband, that mannour being then in the seisin of the king: the king's attorney answered, that she ought not to be endowed, *quia recessit a marito suo in vita sua, & vixit ut adultera cum prædicto Guilhelmo, & non fuit viro suo reconciliata ante mortem suam, & sic per formam * statuti inde prius editi non debet inde dotari.*

The demandants replied, and pleaded a deed of the said John Camoys under seal, in these words:

Omnibus Christi fidelibus ad quos hoc præsens scriptum pervenerit, Johannes de Camoys filius & hæres domini Radulphi de Camoys, salutem in domino. Noveritis me tradidisse & dimisisse spontanea mea voluntate domino Guiliel. Paynel militi Margaretam de Camoys filiam & hæredem Johannis de Gatestien uxorem meam. Et etiam dedisse, concessisse, & eidem domino Guilielmo relaxasse, et quietum clamasse omnia bona, et catalla quæ ipsa Margareta habet, vel de cætero habere possit, & etiam quicquid mei est de præd^a Margareta bonis, vel catallis cum suis pertinen^t. Ita quod nec ego, nec aliquis alius nomine meo in prædicta Margareta, bonis, et catallis ipsius Margareta cum suis pertinen^t de cætero exigere seu vendicare poterimus, nec debemus imperpetuum. Volo et concedo, et per præsens scriptum confirmo, quod prædicta Margareta cum prædicto domino Guilielmo sit, & maneat, ex voluntate ipsius Guilielmi. In cujus rei testimonium sigillum meum apposui, &c. hiis testibus.

And concluded their replication thus; *Virtute ejus scripti dicit, quod non vixit, ut adultera cum prædicto Guilielmo, sed ut uxor ejusdem Guilielmi.*

Whereupon the king's attorney demurred in law, and the record saith, *Et sup^r hoc processum est ad judicium, quod non debet dotari.*

By this record it appeareth, that she was barred of her dower by force of this branch, whereof the king's attorney took advantage: and in the record it is further contained, that the demandants *protulerant quasdam alias literas episcoporum de purgatione adulterii, quæ recitantur in memorand^o.* Et quia super testimonio episcoporum non sunt judicia in curia regis faciend^a, licet literæ episcoporum in curiam regis fuer^t porrectæ, nisi iidem episcopi ad mandatum regis ipsi regi rescriberent.

This deed, for the strangeness thereof, we have recited at large *de verbo in verbum.*

But the husband may give license to a man to carry his wife to his house, and this shall be a good bar in an action brought *de muliere abducta cum bonis viri.*

(9) *Moretur cum adultero.*] Albeit she doth not continually remain in avowtry with the adulterer, yet if she be with him and commit adultery, it is a tarrying within this statute.

Also if she once remain with the adulterer in avowtry, and after he keepeth her against her will; or if the avowterer turn her away, yet she shall be said *merari cum adultero* within this act.

Rot. Parliam.
oct. sancti Joh.
Bapt. an.
30 E. 1. Rot. 2.

* Viz. this
statute of W. 2.
cap. 34.

Concessio mirabilis & inaudita.

[436]

46 E. 3. Bar. 214.
1 E. 4. 1.
20 H. 7. 2.
21 H. 7. 13.

3 E. 3. 2.
6 E. 3. 29.

If the wife doth elope from her husband's house of habitation, and commit adultery in any other the lands or mannours of her husband, this without the free reconciliation of the husband is within the purview of this statute: see hereafter in this chapter for this point.

And there be *parvæ moræ*, and *magnæ*, and both of them within this branch.

(10) *Nisi vir suus sponte, & absque coheritione ecclesiæ eam reconciliet, & secum cohabitare permittat.*] Note that cohabitation is not sufficient without reconciliation made by the husband *sponte*, so as cohabitation onely in the same house with the husband availeth her not; *à fortiori*, though she remain with the avowtrer in any of the lands or mannours of her husband, yet she shall be barred of her dower by this branch, without the husbands free reconciliation, albeit it hath been otherwise holden: and the reason that they yeilded, is because it is no elopement, whereas it appeareth before that the words of *reliquerit & abierit* are not of the substance of the bar of dower, but the adultery, and the remaining with the adulterer, as is above said: and albeit she and the adulterer remain within any of the lands or mannours of the husband, yet (the words being, *si uxor sponte reliquerit & abierit*) she hath left and gone from her husband in that case, which is a personall offence. See the first part of the Institutes, sect. 36. for bars of dower, whereunto you may adde a case in Tr. 9 E. 2. fol. 65. in *libro meo*, that if a woman say that she is conceived with childe by her husband whiles he lived, and in truth is not, whereby the next heir is disturbed, she shall lose her dower, if she acknowledge the same before the justices.

And albeit she both cohabite, and be reconciled, yet if it be by the coherition of the church, she shall be barred of her dower.

(11) *Qui monialem a domo suo abducat, licet monialis consentiat, puniatur per prisonam trium annorum, & satisfaciat domui a qua abducta fuerit competenter, & nihilominus redimatur ad voluntatem regis.*] *Monialis*, i. *Monacha*, nonna, quasi non nupta, sed deo consecrata, he that carrieth a monk out of his cloister, the abbot or prior, &c. of the house shall not have an action of trespass for the taking of him away, but his remedy is by the writ of *apostata capiendo*; but * that writ doth not lie for a nun: and therefore the common law did give an action of trespassse for taking her away, as the lord might have an action of trespassse at the common law for his ward; and this act was made to give a further punishment; for the writ in the Register doth not recite this act, but the plaintiff shall not take advantage of this act, unless he conclude, *contra formam statuta, &c.*

* [437]
Regist. 71. 267.

Now the writ *de moniale abducta* saith, *Quare vi et armis claufuras ipsius priorissæ apud L. fregit, et sororem Iocosam Abbe communialem suam ibid' existent' cepit, et abduxit, per quod divinum servitiû in ecclesiâ ipsius priorissæ Sanctæ Helenæ London' multipliciter subtractum fuit, et diminutum, et alia enormia, &c.*

(12) *Et nihilominus redimatur ad voluntatem regis.*] So as albeit the abbess or prioress shall recover damages, and the defendant have judgment to remain in prison by three yeers, yet he shall be indicted and ranfomed at the kings suit in a legall proceeding, *et sic e converso.*

C A P. XXXV.

DE pueris masculis, sive femellis (1), (quorum maritadium ad aliquem pertineat) raptis et abductis (3), si ille qui rapuit non habens jus (2) in maritagio, licet postmodum restituat puerum non maritatum, vel de maritagio satisfecerit, puniatur tamen pro transgressione per prisonam duorum annorum (4). Et si non restituerit, vel hæredem post annos nubile maritaverit, et de maritagio satisfacere non potuerit (5), adjuret regnum, vel habeat perpetuam prisonam (6). Et super hoc habeat querens tale breve (7):

Si A. fecerit te securum, &c. tunc pone per vad', &c. B. quod sit coram justiciariis nostris, &c. ostens' quare talem hæred' infra ætatem existentem, cujus maritadium ad ipsum A. pertinet, apud C. inventum, tali loco rapuit et abduxit (8), contra voluntatem ipsius A. et contra pacem, &c.

Et si hæres sit in eodem comitatu, tunc addatur ista clausula.

CONCERNING children males or females (whose marriage belongeth to another) taken and carried away, if the ravisher have no right in the marriage, though after he restore the child unmarried, or else pay for the marriage, he shall nevertheless be punished for his offence by two years imprisonment; and if he do not restore, or do marry the child after the years of consent, and be not able to satisfy for the marriage, he shall abjure the realm, or have perpetual imprisonment; and thereupon the plaintiff shall have such a writ:

And if the heir be in the same county, then this clause must be thereto added:

Et diligenter inquiras ubi ille hæres sit in baliva tua, et ipsum ubicunque inventus fuerit capias, et salvo et secure custodias, ita quod eum habeas coram præfat' justiciariis nostris ad præfatum terminum, ad reddend' cui prædictorum A. et B. reddi debeat.

Et fiat scēla versus partem de qua queritur, quousque per districtionem venerit, si habeat per quod distringi poterit, vel per contumaciam (si non sit justificabilis) exigatur, et utlagetur. Si fortē hujusmodi hæres ducatur, et transferatur in alium comitat' (9), tunc vic' illius comitatus [438] fiat tale breve sub hac forma:

And suit shall be made against the party on whom complaint is made, until he come in by distress, if he have whereby he may be distrained; or else for his contumacy, in case he be not justifiable, he shall be outlawed. And if perchance the heir be married, or carried into another county, then a writ shall be directed to the sheriff of the same shire in this form:

Questus est nobis A. quod B. nuper talem hæredem infra ætatem, et in custodia sua existent', tali loco in comitatu tali rapuit, et de comitatu illo ad talem locum in com' tuo abduxit, contra voluntatem ipsius A. et contra pacem, &c. Et ideo tibi præcipimus, quod prædictum hæredem, ubicunque eum in baliva

baliva tua invenire poteris, capias, et salvo et secure eum custodias, ita quod eum habeas coram justiciariis nostris, &c. tali loco et die, quem diem idem A. habet versus prædictum B. ad reddend' cui de jure reddi debeat.

*Et si hæres antequam inveniri poterit, vel antequam restituatur querenti, obierit (10), nihilominus procedat placitum inter eos, quousque terminetur, cui restitui deberet, si superstes fuisset. Nec excusabitur aut alleviabitur ille, qui injustè rapuit hujusmodi hæred' de pœna supradicta per mortem hæred', cujus extitit male fidei possessor dum vixit. Et si querens obierit ante placitum terminatum (11), si jus ei competeat ratione proprii feci sui, resummonetur loquela ad sectam hæred' querentis, et procedat placit' debito ordine. Si vero per alium titulum competeat ei jus, sicut titulo donationis, venditionis, aut alio hujusmodi titulo, tunc resummonetur loquela ad sectam executor' querentis, et procedat placit' ut prædictum est. Eodem modo si moriatur pars defendens (12) antequam placit' terminetur vel hæres restituatur, procedat placit' per resum' inter querentem, vel ejus hæredem, seu executores, et executores defendentis, vel ejus hæredes, si executores non sufficiant, quoad satisfactionem de valore maritagii secundum quod in aliis statutis continetur, sed non quoad pœnam prisonæ, quia quis pro alieno facto non est puniendus. Eodem modo cum pendeat placitum inter partes de custodia terræ, vel hæredis, vel utriusque per commune breve, quod incipit: *Præcipe tali, &c.* quod reddat, &c. (13) fiat resummonitio inter hæredes et executores querentis, et similiter hæredes aut executores defendentis, si mors alteram partem præveniat ante placitum terminatum. Et cum perveniatur ad magnam districtionem, detur terminus, (14) infra quem tres con' teneantur ad minus, in quorum quolibet comitatu fiat publica proclamatio, quod deforciatur veniat ad bancum (15) ad diem in brevi contentum, responsurus querenti.*

And if the heir do die afore he can be found, or before he can be restored to the plaintiff, the plea shall pass between them nevertheless, until it be tried unto whom he ought to have been restored if he had been living. Neither shall the ravisher of such a one be excused or eased of the punishment aforesaid by the death of the heir, whom he did withhold by wrong during his life. And if the plaintiff die before the plea determined, if the right belong to him by reason of his proper fee, the plea shall be resummoned at the suit of the heir of the plaintiff, and the plea shall pass in due order. But if the right belongeth to him by another title, as by a title of gift, sale, or other such like, then the plea shall be resummoned at the suit of the executors of the plaintiff, and the plea shall pass as before is said. In the same manner if the defendant die before the plea be tried, or the heir be restored, the plea shall pass by resummons between the plaintiff, his heirs or executors, and the executors of the defendant or his heirs, if the executors be not sufficient to satisfy for the value of the marriage, after as it is contained in other statutes, but not as to the pain of imprisonment; for none ought to be punished for the offence of another. In the same manner when a plea hangeth between parties for the ward of land, or of an heir, or of both, by the common writ that beginneth *Præcipe tali, &c. quod reddat, &c.* Resummons shall be made between the heirs and executors of the plaintiff; and likewise the heirs and the executors of the defendant, if death prevent any of the parties before the plea determined. And when they have passed to the great distress,

*renti. Ad quem diem si non venerit, (16) et proclamatio * sic semel, secundo, et tertio testificatum fuerit, procedatur ad iudicium (17) pro querente: salvo jure defendentis, si postmodum inde loqui voluerit (18). Eodem modo fiat in brevi de transgression' cum quis queritur se ejectum fuisse de hujusmodi custodiis (19).*

distress; a day shall be given, within which three county courts may be holden at the least, in every of which open proclamation shall be made, that the deforcer shall come into the bench at the day contained in the writ, to answer the plaintiff; at which day if he come not, and the proclamation be so returned once, twice, or thrice, the judgement shall pass for the plaintiff, saving the right of the defendant, if after he will claim it. In the same manner it shall be done in a writ of trespass, when any complaineth himself to be ejected from such wardships.

See the first part of the Institutes, sect. 203. (3 Inst. 171. Fitz. Gard. 18. 25. 29, 30, 31, 32. 118. 121. Fitz. Judgm. 102. 116. 123. 150. 157. 172, 204. Bro. Ravishment, 33. 1 Inst. 136. b. Hob. 93. 1 Roll. 445. 2 Roll. 354. Regist. 163. 9 Rep. 71. 74. Fitz. Brief, 823. Rast. 390. 3 Bull. 275. 278. 281. Dyer. 289. Fitz. Brief, 776. 24 Ed. 3. f. 43. 11 H. 4. f. 54. Fitz. Executors, 52. Fitz. Gard. 110. 24 Ed. 3. f. 25. 20 H. 3. c. 6. 3 Ed. 1. c. 22. 52 H. 3. c. 7. Fitz. Proces. 33. Fitz. Gard. 89. Dyer. 369. Regist. 161. &c.

This act of parliament hath made divers alterations and additions to the statute of Merton cap. 6. as hereafter in the exposition of this act shall appeare.

Merton, cap. 6.

(1) *De pueris masculis sive femellis.*] The statute of Merton extended onely to heires males, and this act extendeth by expresse words to heires females also.

Lib. 9. fol. 72.
D. Hufleys
case.

Also the statute of Merton concerning this matter extended to heires *infra 14 annos*; and this act extendeth to all that are *post annos nobiles*.

(2) *Si ille qui rapuerit jus non habens.*] The statute of Merton extended to lay men onely, this act extendeth as well to ecclesiasticall persons, regular or secular, as to lay men.

D. Hufleys case.
ubi supra.
7 E. 3. 11.

(3) *Raptis & abductis.*] The words of the statute of Merton are *vi abductis & detentis*.

(4) *Per prisonam duorum annorum, &c.*] The statute of Merton gave imprisonment *donec emendaverit delictum, &c.* This act gives the imprisonment of two yeares, albeit the ward be delivered unmarried, or though amends be made.

The king may pardon this imprisonment for two yeares, which was added by this act.

P. 34 E. 1.
Coram Rege.
Rot. 30.

(5) *De maritagio satisfacere non potuerit.*] The defendant shall be intended sufficient to satisfie the plaintiffe, if the plaintiffe doth not pray that the jurors should inquire of his sufficiency.

8 E. 3. 52.
22 R. 2.
damages 130.

(6) *Abjuret regnum, vel habeat perpetuam prisonam.*] And in this case the election is not given to the defendant, but it is in the discretion of the court to give judgement either of abjuration, or perpetuall imprisonment.

Lib. 9. fol. 73.
D. Hufleys case.

This punishment is also added to the statute of Merton.

Albeit the party that is by judgement abjured return again, yet

yēt shall he not be hanged, because he was not abjured for felony, but he may be punished for his contempt, and remaunded.

(7) *Et super hoc habeat querens tale breve, &c.*] By this branch the writ of ravishment of gard is given, and the forme of the writ is here exprest.

The statute of Merton extended to the writ of right of ward.

A gardein in focage cannot have a ravishment of ward upon this act, but onely a gardein in chivalry, but the gardein in focage shall have a *ravishment de gard*. But it was adjudged soone after the making of this act, that by the 24. chapter of this parliament, which giveth the writ *in consimili casu cadente sub eodem jure & simili indigente remedio*, the gardein in focage shall maintain a writ of ravishment of ward for the body, and a writ *de ejectione custodiæ* for the land.

* For the custome of the city of London concerning orphanage, see 32 E. 3. 8 R. 2.

In this writ if the issue be found for the plaintiffe, yet upon the context of this act the jury shall enquire, 1. of the value of the mariage, 2. of the age of the ward, and 3. whether he be married or no: and for the first and second they must give a direct verdict; for the other they may give a conditionall verdict, as to say, whether he be married or no they know not, and if he be married then asseſſe greater damages, which enquiry is but an inquest of office.

Now albeit the verdict be conditionall, yet in this case the judgement shall not be conditionall, but in this case the plaintiffe may have judgement to recover the marriage and lesser damages, and have execution of the body, and if the sheriffe return that he is married, then may the plaintiffe have a *ſcire facias* for the greater damages, and have judgement to recover them, and so it is in an action of detinue, &c.

(8) *Rapuit et abduxit.*] There be two sorts of ravishments of wards, that is to say, ravishments in deeds, and ravishments in law, and this statute extends to both of them.

Ravishments in deed, as when one take and carry away a ward; and ravishments in law be, as if the ward enter into religion, this is a ravishment in law, for which the soveraigne shall answer, for that his admission of him is a ravishment in law.

If a man or a woman marry a ward to his or her daughter, or to any other, this is a ravishment in law.

A man procureth a ward to goe from his gardein, this is a ravishment in law.

If one ravish a ward, or eject the lord to the use of a stranger without his privity, yet if the stranger agree thereunto, he is the ravisher or ejecter.

This act is intended of a gardein in chivalry, as hath been said: and though the father shall have a writ of ravishment of ward, *quare filium suum & hæredem rapuit, cujus maritogium ad ipsum pertinet*; and albeit the auncestor shall have the like action for the taking of his collaterall heire apparent, yet none of those are within this statute, but remain at the common law.

See the first part of the Institutes, sect. 114.

The count in the ravishment of ward upon this act must not be by *vi et armis*.

(9) *Si forte hujusmodi hæres ducatur et transferatur in alium comitatum.*]

Temps E. 1.
gard 133. 3 E. 2.
ibid. 6. 11 H. 3.
ibid. 141.
11 E. 2. ibid. 127.
33 E. 3. ibid. 163.
1 E. 3. 19, 20.
4 E. 3. 5.
17 E. 3. 42.
26 E. 3. 65.
6 R. 2. gard. 166.
13 H. 4. 17.
F. N. B. 140.
c. 39. f.
32 E. 3. gard 31.
8 R. 2. gard 166.
9 E. 3. 37, 33.
22 E. 3. 19.
24 E. 3. 49.

* [440]

9 E. 3. 37, 38.
14 E. 3. gard.
157. 19 E. 3.
gard. 172, 127.
16 E. 3. ibid.
107. 17 E. 3. 57.
45 E. 3. 15.
47 E. 3. 19.
11 H. 4. 80.
21 H. 6. 41.
32 H. 6. 3.
11 H. 7. 5.
First part of the
Instit. sect. 202.

8 E. 3. 52.

11 H. 4. 24.
30 E. 3. 6. b.
38 E. 3. 18.
38 Aff.

18 E. 3. 25.
41 E. 3. 15.
First part of the
Institutes, sect.
114. many au-
thorities there
cited.

7. H. 4. 9.

comitatum.] A man cannot have a writ of ravishment of ward in the county of York, and suppose the ravishment in the county of Derby, *et quod abductus fuit ab eodem comitatu usque com' Eborum.* But his originall must be in the county of Derby, and by this branch he shall have the writ here mentioned, *questus est nobis* directed to the sheriffe of York, whither the body is carried.

If the ward be resistant in another county, then where the land is, the lord may have a writ of right of ward in that forein county where the ward is resistant.

(10) *Et si bares obierit.*] Albeit the body shall be recovered in the writ of ravishment of ward given by this act, yet it is expressly provided by this branch that the death of the heir shall not abate the writ; but otherwise it is in a writ of right of ward, for in that case the death of the heire shall abate the writ; and so it is if the heire (having the writ) commeth to his full age, the writ of right of ward shall abate, but not the ravishment of ward, but if he be of full age at the time of the writ of ravishment brought, then the writ shall abate for the words of the writ, *cujus maritagium ad ipsum pertinet.*

(11) *Et si querens obierit ante placitum terminatum.*] Two joynt lords or two coparceners of a feignory bring a writ of ward, and one of the plaintifles die, the writ is abated, and the survivor shall not have a resummons, for this act giveth the resummons either to the heir, or to the executors, and not to any survivor, who may have a new originall; and so it is if the baron and feme be plaintifles, and the husband dieth, the writ shall abate, and no resummons shall be sued, because one of the plaintifles is alive, to whom the wardship surviveth, *et pars querens non obiit*; and the nature of a resummons is to continue the originall writ, for by the common law no resummons did lie but against him that was party to the originall, or which came in by voucher or receipt, &c. so long as the tenant lived, and onely where the plea was put without day, without any laches or default in the party, as upon a consens graunted and failer of right by the demise of the king, the *non venu* of the justices, or when the paroll demurred for nonage, or upon the allowance of a protection and the like; but if the process be not continued by the negligence of the plaintiffe, no resummons lieth.

Also no resummons lieth for the defendant or tenant, because resummons is compounded of *re, sub,* and *moneo*: and the defendant or tenant never sued out summons, and therefore can have no resummons, neither shall a resummons be graunted but against him that was formerly summoned, and upon the resummons by this act the party cannot vary from the former plea, but onely for matter that commeth of puiſue time, as a release, &c.

And where some have holden that the makers of this act were not learned in the law, because the resummons is given to the heire, where by law the heire cannot have the wardship being but a chattell, the makers of the law knew that as well as the objector, for it is said in 9 E. 3. that they were *sage gents* that were at this parliament, but seeing no resummons in this case did lie by the common law, the makers of this act gave the resummons to the heire when the wardship accrued *ratione proprii feodi*, for there the inheritance of the tenure might come in question which concerned the heir more then the wardship, *hac vice*, could concern the executors, and as if the defendant make his testament, and deviseth

Dier 12 El. 289.
34 E. 3. gard.
164.

40 E. 3. 5.
21 E. 3. 45.

46 E. 3. bre. 776.
18 E. 3. Scire
fac' 10. 34 E. 1.
gard 129.
30 E. 3. 14.
9 E. 4. 50.

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19 E. 3. Scire
fac' 119.
38 E. 3. 36.

24 E. 3. 48.
5 H. 7. 53.

11 H. 4. 54.
p. Hill.
9 E. 3. 22.
18 E. 3. 4. 5.
24 E. 3. 43. 49.

18 E. 3. 4. b.

the ward to another, yet the resummons shall be awarded by the next subsequent clause of this act against the executors, although they have nothing in the ward, and, for their insufficiency, against the heire who cannot claime the ward being but a chattell; so *in novo casu providebant novum remedium*, and in one case charged the heire of the defendant, whom the law could not charge, and in another gave remedy to another heire upon good reason, who by law had none.

50 E. 3. 7. b.

(12) *Eodem modo si moriatur pars def. &c.*] If a writ of ward he brought against two, and one of them die, no resummons shall be sued by this branch, because one of the defendants are alive, and he shall have the ward by survivor, and this branch giveth the resummons either against the executors or heire, *Et pars defendens non est mortuus*.

And the nature of a resummons (as hath been said) is to continue the originall.

24 E. 3. 48.

If the plaintiffe in the writ of ward dieth, and a resummons is sued by the heire, upon the next precedent branch, if the defendant dieth the heire shall have a resummons against the executors of the defendant, for the words of this branch be, *inter querentem, vel ejus hæredem seu executores, et executores defendantis, &c.*

7 E. 3. 48.

18 E. 3. 4. 5.

24 E. 3. 49.

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Though this branch saith, *eodem modo*, yet for so much, as is otherwise provided for, there is no reference by these words to the former clause, for a resummons lieth not against the heire of the defendant, if the executors have assets, and it is a good plea for the heire to say that the executors have sufficient; but if the executors have assets for part, and the heire assets for part, yet no resummons is given against them both by this act.

And in a resummons against the executors upon this act of parliament *plcinment administer* is a good plea; but then the plaintiffe shall have judgement *maintenant* to recover the ward; and in a resummons against the heire for the insufficiency of the executors, it is a good plea for him, that he hath nothing by descent in fee-simple.

If the executors have not assets, so as the heire is to be charged, yet shall damages onely be recovered against him: but the punishment ordained by this act shall not be inflicted upon him, for that should be against a maxime of the common law here rehearsed, *quod quis pro alicno facto non est puniendus, et pœna ex delicto defuncti hæres teneri non debet*; and againe, *in hæredes non solent transire actiones, quæ pœnales ex maleficio sunt*: and, *toties in hæredem damus actionem de eo quod ad eum pervenit, quoties ex dolo defuncti convenitur non toties ex suo*.

Brafton.

And, *filius non portabit iniquitatem patris*.

(13) *Eodem modo cum pendeat placitum inter partes de custodia terræ, vel hæredis, vel utriusque, per commune breve præcipe tali, &c. quod reddat, &c.*] *Per commune breve*. Hereupon it is called, *breve de communi custodia*, that is, *breve de recto de custodia*, and to that writ onely the statute of Marlebridge extended.

Marl. cap. 7.

(14) *Et cum pervenerit ad magnam districtionem, detur terminus.*]

Marlb. cap. 7.

14 E. 3. Procl. 8.

The statute of Marlebridge gave a proclamation, *si ad magnam districtionem non venerint, &c.* so as by that act the grand distresse must be returned before the proclamation issued, but by this act the proclamation is to issue when the grand distresse is graunted, for

for the words be, *cum pervenerit ad magnam districtionem, detur terminus, &c.* 30 E. 3. 10, 11.
49 E. 3. 19.

Also the statute of Marlebridge provided, that *bis vel ter, &c. infra medietatem anni sequentis* the proclamation should be made, so as the counties were put in certain when the proclamation should be made; now this act abridgeth the fixe months to three months, and sets the time of the proclamation in certain. This branch extendeth onely to the writ of right of ward, as the statute of Marlebridge did, *vide* in the end of this chapter. Marib. cap. 7.

This branch restraining the common law, extendeth not to the vouchee, but onely to the defendant in deed, and not to the defendant in law. 29 E. 3. 43. 13.
Proc. am. 9.

If *propter brevitatē temporis* there were but two proclamations made, the plaintiffe shall not have a writ, *cum allocatione comitat'*, because he pursued not the statute, and it was his folly that the writ contained not longer time. 2 H. 4. 1.

In a writ of ward against two, the one appeareth, and the other makes default, or if the one have nothing, and the other is distrained, no proclamation shall be awarded against the one of them, for both of them make but one defendant, and therefore either against both, or against none. 19 E. 3. Procl. 5.
& 10. 17 E. 3. 70.
14 H. 4. 37.

If a distresse with a proclamation be graunted, and the defendant hath nothing but within a franchise, the sheriffe shall make the proclamations in the county, and the bayly of the liberty shall distraine him. 2 H. 4. 1.

The proclamation must be graunted in the same county where the originall is brought; and therefore if the plaintiffe surmise that the defendant hath sufficient in a forein county, he shall have a distresse at the common law, but not with proclamation by this statute. 17 E. 3. 70, 71.

(15) *Veniat ad bancum.*] This extends not to justices in eyre, nor to commissioners of oier and terminer, but the plaintiffe may have an action of trespassse before them at the common law. [443]
3 E. 3. Proclam.
17. 29 E. 3. 37.

(16) *Ad quem diem si non venerit, &c.*] See 17 E. 3. 19. here in the next paragraph, by which it appeareth that he must come *ad quem diem, et non ad alium.* 17 E. 3. 19.

(17) *Procedatur ad iudicium.*] At the common law he could not have judgement by default without plea of the party, &c. but distresse infinite; if upon the proclamation returned the defendant be demanded, and appear, and taketh a day by *prece partium*, and at that day make default, the plaintiffe shall not have judgement upon this statute, because he made not default at the return of the distresse, for this act saith, *ad quem diem si non venerit.* 22 E. 3. 19.

And where it is said, (*procedatur ad iudicium*) yet upon this default no judgement can be yet given, but the court must award a writ to the sherife, to inquire of the value of the marriage, of the age of the ward, and whether he be marryed, &c. as is aforesaid; and upon the return of that writ, then judgement shall be given. 42 H. 3. 1.
38 E. 3. 21.

But if the defendant appear at the return of the proclamation, and confesse the action, the plaintiffe shall have judgement of the damages in his count.

(18) *Salvo jure defendentis, si postmodum inde loqui voluerit.*] Some have conceited upon these words [*inde loqui voluerit*] that if a man recovereth

16 E. 3. Gard.
108.

recovereth in a writ of right of ward by default, that the defendant might have a writ of right of ward, and recover again that which he formerly lost; but by reason of this word [*postmodum*] those words shall be intended, that he may have a writ of right of ward after that another tenant of the same land happen to dye his heir within age, but for the same wardship, whereof judgement is given in the writ of right of ward, the defendant is barred.

3 E. 3. 7. 30 E. 3.
10, 11.

(19) *Eodem modo fiat in brevi de transgressione cum quis queritur se ejectum fuisse de hujusmodi custodiis.*] The writ here intended, is an ejectment de gard, breve de ejectione custodiæ, which is a writ at the common law. De attornato inde.

Regist. 162.

Inter H. & R. de quadam transgressione eidem H. per præfatum R. illata ut dicitur.

Regist. ubi supra.

14 E. 3. Procl. 7.

By this branch, proclamation shall be made in this writ of the ejectment of gard, which shall not be made in the ravishment de gard.

C A P. XXXVI.

QUIA domini cur', et alii qui cur' tenent, et senescalli (1), volentes gravare subditos suos (2), cum non habeant legalem viam eos gravandi, procurant alios movere querelas (3) versus eos, et dare vadium, et offerre plegios, vel impetrare brevias, et ad factas hujusmodi querentium compellunt eos sequi comitatum, hundredum, wapentachium, et * cur', quousque finem fecerint cum ipsis pro voluntate sua: statutum est, quod hoc de cætero non fiat. Et si quis per hujusmodi falsas querimonias fuerit attachiatus, replegiat districtionem suam (4) sic captam, et poni fac' loquelam coram iusticiariis, coram quibus si vicecomes, vel alius balivus, vel dominus, postquam sit districtus formaverit querimoniam suam, advocaverit iustam districtionem ratione hujusmodi querimoniarum (5) coram eis factarum, et replicet', quod hujusmodi querimonie movebantur versus eos malitiosè, ad instantiam seu procuracionem vic', aut aliorum balivorum, aut dominorum (6), admittatur illa replicatio. Et si super hoc convicti fuerint, versus dominum regem redimantur (7), et nihilominus

FORASMUCH as lords of courts, and other that keep courts, and stewards, intending to grieve their inferiors, where they have no lawful mean so to do, procure other to move matters against them, and to put in surety and other pledges, or to purchase writs, and at the suit of such plaintiffs compel them to follow the county, hundred, wapentake, and other like courts, until they have made fine with them at their will; it is ordained, that it shall not be so used hereafter. And if any be attached upon such false complaints, he shall replevy his distress so taken, and shall cause the matter to be brought afore the justices, before whom if the sheriff, bailiff, or other lord (after that the party distrained hath framed his plaint) will avow the distress lawful by reason of such complaints made unto them, and it be replied that such plaints were moved maliciously against the party by the solicitation or procurement of the sheriff, or other bailiffs, or lords, the same replication shall be admitted; and if they be convicted hereupon, they shall

minus hujusmodi sic gravatis damna in shall make fine to the king, and nevertheless restore treble damages to the parties grieved.

(22 Ed. 3. f. 15. Fitz. Avowry, 78. 13 Hen. 4. 2.)

This act was made in affirmance of the common law, and to adde a greater punishment then the common law did; for the delinquent shall be ransomed at the kings suit, and the party grieved shall recover treble damages, where he should recover but single at the common law.

If A. procure B. to sue an action in any court of record, or other inferiour court against C. he may have an action of deceit against A. at the common law, and recover his single damages. 43 E. 20. F.N.B. 98. m. Regist. Judic. 37.

(1) *Quia domini curiarum, et seneschalli, &c.*] This act extendeth to court barons, leets, and to county courts, tourns, hundreds, and not to the courts at Westminster (they being afterwards named in this act, &c.) but they remain at the common law. 41 Ed. 3. Avowry 78. 11 H. 4. 91. 13 H. 4. 2. 8 E. 4. 5.

Though *seneschalli* be here named, yet bailifes, and other officers are within this act, and the bailife, or other officer may be punished, without naming the lord. 13 H. 4. 2. 3. 41 E. 3. Avowry 78.

(2) *Volentes gravare subditos suos.*] *Subditos* is here taken for any man that is subject to their jurisdiction, and so it is to be taken in all other like places.

(3) *Procurant alios movere querelas, &c.*] These words are generall, and therefore if the lord, bailife, steward, or any other officer procure any man to sue a lawfull action, he shall be punished by this act, *Quia culpa est se immiscere rei ad se non pertinenti.* 22 E. 3. 15. 11 H. 4. 91. 13 H. 4. 2.

(4) *Replegiat districtionem suam.*] This act extendeth onely to a replevin, and not to an action of trespassie, or any other action. 13 H. 4. 2. b.

And here a distress is taken for an attachment.

(5) *Advocaverit justam districtionem ratione hujusmodi querimoniar', &c.*] By the letter of this branch the defendant must make an avowry, but it must be extended further then the letter; for admit that the lord, &c. will (to save himself from treble damages) make no avowry, but plead that the goods were not distrained, &c. or the like plea, whereupon issue being joyned, the plaintife after proof of the issue may give in evidence for the treble damages the purview of this act, and that the lord now defendant, procured a suit, &c. contrary to this act, and that he is guilty of the distress, or attachment, and therefore ought to yeeld treble damages; and if this be found by the jury (although it were not pleaded) the pl' shall recover treble damages; for it lyeth not in the power of the defendant by his false plea to excuse himself of treble damages given by this act: as if the disseisor alieneth to persons unknown, and in an assise brought against the disseisor he plead *Nul ten' de franktenement nosme in le briefe, et si trove ne soit nul tort nul disseisin*, the plaintife may give in evidence, that the said alienation was made to defraud the plaintife of his action, and that the disseisor took the profits, in which case he is to be relieved by the statutes of 1 R. 2. 4 H. 4. and 11 H. 6.

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Videli. 5. f. 60. Gooches case, a statute given in evidence, and not pleaded.

1 R. 2. cap. 9.
4 H. 4. cap. 7.
11 H. 6. cap. 4.
9 H. 6. 14, 15.
lib. 1. cap. 123.
Chudleys case.

See before cap. 35. in the case of ravishment of ward.

II. INST.

3 E

(6) *Malitiose*

22 E. 3. 15.

(6) *Malitiose, ad instantiam, seu procuracionem vicecom', aut aliorum balivorum, seu dominorum.*] Here it is to be observed that the procurement is the substance, and that doth imply, that it was done *malitiosè*; and therefore if the jury finde the procurement, and that it was not done maliciously, yet the court shall (for that it judicially appeareth to them) adjudge it done maliciously.

(7) *Versus dominum regem redimantur, &c.*] That is, they shall be fined to the king in that suit brought by replevin.

C A P. XXXVII.

QUIA etiam balivi, ad quos ex officio pertinet districtiones facere, gravare volentes subditos suos, ut ab eis pecuniam extorqueant, mittunt ignotos ad faciend' districtiones, ea intentione, ut subditos gravare possint, per hoc quod sic districti non habentes notitiam personarum non permittunt hujusmodi districtiones super eos fieri: statutum est, quod nulla districtio fiat (1) nisi per balivos notos et juratos (2). Et si alio modo districtiones fecerint, et de hoc convicti fuerint, si gravati breve de transgress. impetraverint, restituant gravatis damna (3) [alias in triplo] et versus regem graviter puniantur.

FORASMUCH also as bailiffs, to whose office it belongeth to take distresses, intending to grieve their inferiors that they may exact money of them, do send strangers to take distresses, to the intent that they might grieve their inferiors, by reason that the parties so distrained, not knowing such persons, will not suffer the distresses to be taken; it is provided, that no distress shall be taken, but by bailiffs sworn and known. And if they which do distrain do otherwise, and thereof be convict (if the parties grieved will purchase a writ of trespass) they shall restore damages to the parties grieved, and besides, shall be grievously punished towards the king.

(3 Rep. 12.)

This act is made in affirmance of the common law, and for reformation of an abuse by sherifes, who used to make bailifes to distrain, who were unknown, to the intent that the owner of the cattell might make rescous, and thereupon the sherife, &c. to extort money from him; wherefore remedy is given by this act.

Lib. 3. fol. 12.
Sir William
Herberts case.
25 E. 3. cap. 25.

(1) *Nulla districtio fiat.*] At the time of the making of this act, this processe lay in an action of debt, (for the capias in that case is given by the statute of 25 E. 3.) so as this statute extending to an action of debt, although the latter act give a capias, yet the capias coming in lieu of the distresse is within this act.

(2) *Nisi per balivos notos, et juratos.*] By this act the bailifes must both be known and sworn: an act yet standing in force, and worthy to be put in execution: Fleta doth render this branch thus:

Provisum est quod nulla districtio fiat per balivos regis, nisi jurati fuerint et noti, et si quis alio modo distringeret, et de hoc convincatur ad sectam

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Fleta.

seetam districci, cui in hoc casu consulitur per breve de transgressione, damna reddet gravato, et versus regem graviter punietur.

Of this branch the Mirror saith thus, *Le statute de distresses est distinguisable, car in distresses torcions sans garrant tient lieu le judgement de robbery, et per garrant cheacun est receivable conus et disconus.* But the statute is in the negative, and necessary to be observed.

(3) *Damna.*] Some editions have *alias in triplo*, but the original is *damna*, and not *in triplo*, and therewith agreeth Fleta.

C A P. XXXVIII.

QUIA etiam vic' hundredarii, et balivi libertatum consueverunt gravare subditos suos ponendo in assisis et juratis homines languidos, et decrepitos, perpetua vel temporali infirmitate languentes, homines etiam tempore summonition' sue in patria non commorantes, summonendo etiam effrenatam multitudinem juratorum, ita ut à quibusdam eos in pace dimittendo pecuniam extorqueant, et sic fiunt assisæ et juratæ multotiens per pauperiores, divitibus pro suo dando domi commorantibus: statutum est, quod de cætero non summoveantur in una assisi. plures quam xxiv. (1). Senes etiam videlicet ultra 70. annos (2), perpetuo languidi (3), vel tempore summonitionis infirmi (4), vel in patria non commorantes (5), non ponantur in juratis, vel minoribus assisis (6). Nec etiam ponantur in assisis vel juratis, licet in proprio com' capi debeant aliqui qui minus ten' habeant, quam ad valentiam viginti solidorum per annum (7). Et si huiusmodi assisæ et jurat' extra comitatum capi debeant, non ponantur in eis aliqui qui minus tenement' non habeant, quam ad valentiam xl. s. per annum, illis exceptis qui testes sunt in chartis (8), vel aliis scriptis, quorum præsentia necessaria est, dum tamen potentes sint ad laborandum. Nec debet istud statutum extendi ad magnas assisas, in quibus oportet aliquando ponere milites in patria non residentes, propter paucitatem militum,

FORASMUCH also as sheriffs hundreders, and bailiffs of liberties, have used to grieve those which be in subjection unto them, putting in assises and juries men diseased and decrepit, and having continual or sudden disease; and men also that dwelled not in the country at the time of the summons; and summon also an unreasonable multitude of jurors, for to extort money from some of them for letting them go in peace, and so the assises and juries pass many times by poor men, and the rich men abide at home by reason of their bribes: 'it is ordained, that from henceforth in one assise no more shall be summoned than four and twenty; and old men, above threescore and ten years, being continually sick, or being diseased at the time of the summons, or not dwelling in that country, shall not be put in juries of petit assises. Nor any shall be put in assises or juries, though they ought to be taken in their own shire, that may dispend less than twenty shillings yearly. And if such assises and juries be taken out of the shire, none shall pass in them but such as may dispend forty shillings yearly at the least, except such as be witnesses in deeds or other writings, whose presence is necessary, so that they be able to travel. Neither shall this statute extend to great assises, in which it behoveth many times knights

militum, dum tamen tenement' habeant in comit'. Et si vic' vel subballivi sui, vel ballivi libertatum contra istud statutum in aliquo articulo venerint, et super hoc convincantur, restituant dampna gravatis, et nihilominus sint in misericordia domini regis. Et habeant justiciarii ad assisas capiend' assign' (9), cum in com' venerint, potestatem audiendi querimonias singulorum conquerentium, quoad articulis in isto statuto contentis, et justiciam in forma predicta exhibend'.

to país not resident in the country, for the scarcity of knights, so that they have land in the shire. And if the sheriff, or his undersheriffs, or bailiffs of liberties, offend in any point of this statute, and thereupon be convicted, damages shall be awarded to the parties grieved, and they shall nevertheless be amerced to the king. And justices assigned to take assises, when they come into the shire, shall have power to hear the complaints of all complainants as to the articles contained in this statute, and to minister justice in form aforesaid.

Fleta, li. 4. cap. 5. See 21 E. 1. stat. de non penendis. 34 E. 1. Ordinat. &c. dit super Chart. ca. 9. Marlbr. ca. 24. For Jurors. See Customier de Norm. ca. 69. (Kelyng, 16. 28 Ed. 1. stat. 3. c. 9. to H. 4. f. 8. 2 Roll 163. Bro. Jurors, 24. 1 Inst. 158. Kel. 97. 8 Ed. 3. f. 30.)

The mischief doth plainly appeare by the preamble, and the end of these mischiefs was, that the sheriffes by such meanes did *pccuniam extorquere, &c.*

See the first part of the Institutes for the antiquity and right institution of trials by twelve men, and of the number of twelve. Sect. 234. and *Magna Charta* cap. 29.

2 H. 7. 8. Fleta
ubi supra.
Dier 1. Mar. 98.
Fleta ubi supra.

(1) *In una assisa plures quam 24.*] This was but the abuse of the sheriffe, for though the writ, which is his warrant, is but twelve, yet regularly he must returne twenty foure, and no more, unlesse it be in speciall cases: *Supponendo, inquit Fleta, superfluum hominum multitudinem, ita quod quosdam in pace dimitterent prece vel precio;* but in a writ of right there be sixteene jurors returned onely.

F.N.B. 166. d.

(2) *Senus ultra 70. annos, &c.*] This statute is a direct prohibition in it selfe. and therefore the party grieved may have his action upon this act against the sheriffe without giving any notice either of this, or of sickness, or non-commerancy, and yet the use is to sue out a writ grounded upon this act to the sheriffe that he returne them not.

F.N.B. ibid. 2.
Regist. 177.

But without question notice by word were good, if notice were requisite; and this seemeth to be in assurance of the common law, for if a coroner be *senio contractus*, it is a good cause to remove him, and the prophet David saith, *Dies nostrorum in ipsis septuaginta anni.*

Psalme 89. 10.

(3) *Perpetuo languidi.*] As if he be *morbo paralyti percussus*, or if hee bee *leprosus*, or thicken with any other continuall sickness.

It also extended to men that are blinde, deafe, of no sound memory, or so lame as they cannot well goe nor stand, and these shall take the benefit of this statute, of what age soever they bee; and this point is in assurance of the common law, for these be good causes to remove a coroner.

F.N.B. 164.
Regist. 177.

(4) *Tempore summotionis infirmi.*] This must be so intended, so infirme as he is not able to serve; and this is also in assurance of the common law.

(5) *In patria non commorantes.*] The statute of *articuli super chartas* doth adde to this, that albeit they be commorant in the same county, yet must the jurors have two qualities, *viz.* two of the most, and one of the least, that is most neare the place, most sufficient, and least suspicious, or otherwise the demandant shall render double damages, and bee grievously amerced.

Art. super Chart.
cap. 9.
Regist. 177.
F.N.B. 165.
Regist. ubi sup.

See what a coroner ought to be, *viz.* *Qui melius sciat et possit officio illi intendere.*

Regist. ubi sup.

If any be returned contrary to the purview of this act, he cannot be challenged, neither can the party grieved alledge the matter for his discharge, but he must take his remedy by action against the sheriffe upon this act.

[448].
F.N.B. 166. d.

Now may it be a question, who is the party grieved that shall have his action, if the sheriffe returne *magis remotos, minus sufficientes, et magis suspectos*? whereunto heare what S. William Herle chiefe justice of the common pleas saith, This statute may be intended, in case where the demandant or plaintiffe is delayed of his suit by such return of the sheriffe, that he by the statute shall recover damages against him, or where the tenant or defendant after he hath lost his land, or cause by the oath of them that be so returned contrary to the forme of the statute, and after he doth convict them in an attain, and thereby be restored, then he may have his action upon the statute to recover his damages, &c. and thereunto Hill justice agreed, which (as concerning the tenant or defendant) must of necessity be intended of this act of W. 2. for the statute of *articuli super chartas* give double damages onely to the demandant, and not to the tenant: also hereupon it followeth that the act of *articuli super chartas* is but an exposition of this act, and addeth a further penalty.

8 E. 3. 30.
7 E. 3. 26. bis.

More shall be said hereof, when we come to the said statute of *articuli super chartas*.

Art. super Chart.
cap. 9.

(6) *Vel in minoribus assis.*] For as hath beene said, this act extends not to a writ of right, as hereafter in this act by expresse words it appeareth.

(7) *Qui minus tenementa habeant quam ad valenciam viginti solidi per annum, &c.*] These summes of 20 s. and 40 s. are altered by later statutes, *viz.* by 2 H. 5. and 27 Eliz.

2 H. 5. c. 3.
stat. 2.
27 Eliz. ca. 10.

See the first part of the Institutes, sect. 464.

(8) *Exceptis qui testes sunt in chartis, &c.*] Here is an exception of witnesses named in the deed, who in many cases are joyned to the jury without regard had to age or yearly revenue, both because the sheriffe hath an expresse warrant to summon or distrain them by name, and for that their presence is necessary, and yet with this caution, *Dum tamen potentes sint ad laborandum.*

Stat. of York,
c. 2. 6 H. 3.
Proc 209 8 H.
3. ibid. 210.
Kels. 97. Re-
gist. judic. 6. b.
7. b. 56. 58. 69.

(9) *Et habeant justici' ad assisas capiend' assignat'.*] This clause is in the affirmative, and therefore the party grieved may take his remedy upon this act, either before justices of assise, or in any other court that have conusans thereof: for justices of assise could not have power in this case without expresse words, but other judges have power without any expresse words, and therefore if the meaning be to exclude other judges, then those that be named, there must be words negative, *viz.* and not in any other court, nor before any other judges.

C A P. XXXIX.

QUIA justiciarii (ad quorum officium spectat unicuique coram eis placitandi justiciam exhibere frequentius impediuntur, quo minus officium suum debet modo exequi possint, per hoc quod vic' brevia originalia et judicialia non retornant, per hoc etiam quod ad brevia domini regis falsum retornant responsum: providit dominus rex et ordinavit, quod illi qui timent malitiam vic', liberent brevia sua originalia et judicialia in pleno com', vel in retro com' (2), ubi fit collatio denariorum domini regis, et capiatur billettum (1) de vic' presente, vel subvic', in quo billetto contineantur nomina petentium et tenentium in brevi nominat', et ad requisitionem illius qui breve liberavit, apponat' billetto sigillum vic' vel subvic' in testim', et fiat mentio de die liberationis brevis. Et si vicecomes vel subvicecomes hujusmodi billetto sigillum suum apponere noluerit, capiatur testimonium militum, et aliorum fide dignorum qui presentes fuerint, qui sigill' sua hujusmodi billetto apponant. Et si vic' brevia sibi liberata non retornaverit, et super hoc ad justiciarios perveniat querimonia, mandetur per breve de iudicio justic' ad assisas capiendas assign', quod inquirent per eos qui presentes fuerint quando breve vic' liberatum fuit, si sciverint de illa deliberatione, et inquisitio returnetur. Et si compertum fuerit per inquisitionem, quod breve fuit ei liberat', adjudicentur querenti vel petenti damna, habito respectu ad qualitatem et quantitatem actionis, et ad periculum quod ei evenire posset, per dilationem quam patiebatur. [Anno 2 E. 3. cap. 5. apud Not'.] Et per istam viam fiat remedium quando vic' respondet, quod breve adeo tarde venit (3), quod preceptum regis exequi non potuit. Multociens etiam capiunt

FORASMUCH as justices, to whose office it belongeth to minister justice to all that sue before them, are many times disturbed in due execution of their office, for that sheriffs do not return writs original and judicial; and also for that they make false returns unto the king's writs; our lord the king hath provided and ordained, that such as do fear the malice of sheriffs, shall deliver their writs original and judicial in the open county, or in the county where the collection of the king's money is; and may take of the sheriff or undersheriff, being present, a bill, wherein the names of the demandants and tenants mentioned in the writ shall be contained; and at the request of him that delivered the writ, the seal of the sheriff or undersheriff shall be put to the bill for a testimony, and mention shall be made of the day of the deliverance of the writ. And if the sheriff or undersheriff will not put his seal to the bill, the witness of knights and other credible persons being in presence shall be taken, that put their seals to such bill. And if the sheriff will not return writs delivered unto him, and complaint thereof be made to the justices, a writ judicial shall go unto the justices assigned to take assises, that they shall inquire by such as were present at the deliverance of the writ to the sheriff, if they knew of the deliverance, and an inquest shall be returned. And if it be found by the inquest, that the writ was delivered to him, damages shall be awarded to the plaintiff or demandant; having respect to the quality and quantity of the action, and to the peril that might have come to him by reason of the delay that he sustained; and by this mean

piunt placita dilationes per hoc quod vicecom' respondet, quod præcepit balivis alicujus libertatis (4), qui nihil inde fecerint; et nomen libertates, quæ nunquam retorum brevium habuerunt. Propter quod, ordinavit dominus rex quod thesaurarius et baron' de scaccario (5) liberent justiciar' in rotulo omnes libertates (6) in quibuscunque com' qui habent retorum [450] brevium. Et si vic' respondet quod retorum fecit balivo alterius libertatis, quam alicujus contentæ in prædict' rotulo, statim puniatur vicecom' tanquam exhæredator regis et coronæ suæ (7). Et si forte respondeat quod mandavit balivo alicujus libertatis, quæ veraciter retorn' habet [qui inde nihil fecit (9),] mandetur vicecom' quod non omittat (8) propter aliquam libertatem prædict', quin exequatur præceptum domini regis, et quod scire faciat balivis (10), quibus fecit retorn' quod sint ad diem in brevi contentum ad respondendum, quare de præcepto domini regis executionem non fecerint. Et si ad diem venerint, et se acquietent, quod retorum brevis non fuit eis factum, statim condemnatur vicecom' domino illius libertatis, et similiter parti læsæ per dilationem in restitutionem damnorum. Et si ad diem non venerint balivi, vel venerint, et supradicto modo se non acquietaverint in quolibet brevi de iudicio, quam diu durat placitum, præcipiatur vicecomiti quod non omittat propter libertatem, &c. Multoties etiam vicecom' falsum dant responsum, quod ad illum articulum quod de exit' (11), &c. mandantes aliquando et mentientes, quod nulli sunt exitus, aliquando quod parvi sunt exitus, cum de majoribus respondere possint, aliquando non facientes mentionem de exitibus. Propter quod ordinatum est et concordatum, quod si querens petat auditum responsionis vicecom', concedatur ei. Et si offerat verificare (12), quod vicecom' de majoribus exitibus regi respondere potuit, fiat ei breve de iudicio ad justic'

ad

mean there shall be remedy when the sheriff returneth that the writ came too late, whereby he could not execute the king's commandment. Oftentimes also pleas be delayed by reason that the sheriff returneth that he hath commanded the bailiffs of some liberty which did nothing therein, and nameth liberties that never had the return of writs; whereupon our lord the king hath ordained, that the treasurer and barons of the exchequer shall deliver to the justices in a roll all the liberties in all thires that have return of writs. And if the sheriff answer that he hath made return to a bailiff of another liberty than is contained in the said roll, the sheriff shall be forthwith punished as a disheritor of our lord the king and his crown. And if peradventure he return that he hath delivered the writ to a bailiff of some liberty that indeed hath return, the sheriff shall be commanded, that he shall not spare for the foresaid liberty, but shall execute the king's precept; and that he do the bailiffs to wit, to whom he returned the writ, that they be ready at a day contained in the writ, to answer why they did not execute the king's precept. And if they come at the day, and acquit themselves, that no return was made to them, the sheriff shall be forthwith condemned to the lord of the same liberty, and likewise to the party grieved by the delay, for to render damages. And if the bailiffs come not in at the day, or do come, and do not acquit themselves in manner aforesaid; in every judicial writ, so long as the plea hangeth, the sheriff shall be commanded that he shall not spare for the liberty, &c. Many times also sheriffs make false returns as touching these articles, quod de exitibus, &c. returning sometime, and lying, that there be no issues, sometime that there are small issues, when they may return great, and sometime do make mention of no issues; wherefore it is ordained

ad assisas capiendas assignatos, quod inquirent in presentia vicecomitis, si interesse voluerit, de quibus et quantis exit vic' respondere potuit à die imprecationis brevis usque ad diem in brevi contentum (13) [al' receptionis vide p. 27 H. 8. cap. 10. f. 3. & p. 20 H. 6. cap. 10. fol. 25.] et cum inquisitio retornata fuerit, si de pleno prius non responderit, oneretur de superplusagio (14) per extracelas justic' libertates ad scaccarium, et nihilominus graviter amercietur pro concealamento. Et sciat vicecom' quod redditus, blada in grangia, et omnia mobilia, præter equitaturam, indumenta, et utensilia domus continentur sub nomine exituum (15).

Et præcepit dom' rex, quod vic' pro hujusmodi falsis responsionibus, semel et iterum, (si sit necesse) per [451] justic' castigentur. Et si tertio deliquerint, alius non apponat manum quam dominus rex (16). Multotiens etiam falsum dant responsum, mandando quod non potuerunt [exequi] præceptum regis propter resistantiam (17) potestatis alicujus magnatis, de quo caveat vic' de cætero, quia hujusmodi responsio multum redundat in dedecus domini regis et coronæ suæ (18).

Et quam cito subballivi sui testificentur, quod invenerunt hujusmodi resistantiam, statim (omnibus omisiss) assumpto secum posse comit' sui, eat in propria persona sua ad faciend' executionem (19).

Et si inveniat subballivos suos mendaces (20), puniat eos per prisonam, ita quod alii per eorum pœnam castigentur.

Et si inveniat eos veraces, castiget resistentes per prisonam, a qua non delibenterent sine speciali præcepto dom' regis (21). Et si forte vic', cum venerit,

ordained and agreed, that if the plaintiff demand hearing of the sheriff's return, it shall be granted him; and and if he offer to aver that the sheriff might have returned greater issues unto the king, he shall have a writ judicial unto the justices assigned to take assises, that they shall inquire in presence of the sheriff (if he will be there) of what and how great issues the sheriff might have made return from the day of the writ purchased unto the day contained in the writ. And when the inquest is returned, if he have not afore answered for the whole, he shall be charged with the overplus by the extreats of the justices delivered in the exchequer, and nevertheless shall be grievously amerced for the concealment. And let the sheriff know, that rents, corn in the grange, and all moveables (except horse, harness, and household-stuff) be contained within the name of issues.

And the king hath commanded, that sheriffs shall be punished by the justices once or twice (if need be) for such false returns; and if they offend the third time, none shall have to do therewith but the king. They make also many times false answers, returning that they could not execute the king's precept for the resistance of some great man; wherefore let the sheriffs beware from henceforth, for such manner of answers redound much to the dishonour of the king.

And as soon as his bailiffs do testify that they found such resistance, forthwith all things set apart (taking with him the power of the shire) he shall go in proper person to do execution.

And if he find his underbailiffs false, he shall punish them by imprisonment, so that other by their example may be reformed.

And if he do find them true, he shall punish the resisters by imprisonment, from whence they shall not be delivered without the king's special com-

venerit, resistentiam invenerit (22), *certificet cur' de nominibus resistentium, auxilantium, consentientium, precipientium et fautorum, et per breve de iudicio attachientur* (23) *huiusmodi per corpora ad veniendum ad cur' regis. Et si de huiusmodi resistentia convinctur, puniantur secundum quod domino regi placuerit* (24). *Nec intromittat se aliquis minister domini regis de pœna huiusmodi infligenda, quia dominus rex hoc sibi special' reservat* (25), *pro eo quod huiusmodi resistentes censentur pacis suæ et regni perturbatores.* [13 E. 1. de Mercatoribus, Articuli super Chartas, cap. 16.]

commandment. And if percase the sheriff when he cometh do find resistance, he shall certifie to the court the names of the resisters, aiders, consenters, commanders, and favourers, and by a writ judicial they shall be attached by their bodies to appear at the king's court; and if they be convict of such resistance, they shall be punished at the king's pleasure. Neither shall any officer of the king's meddle in assigning the punishment, for our lord the king hath reserved it specially to himself, because that resisters have been reputed disturbers of his peace, and of his realm.

Fleta, li. 2. ca. 61. Art. super Chart. ca. 16. (2 Ed. 3. c. 5. Regist. 86. 1 Roll, 440. 4 Rep. 65. b. 3 Ed. 1. c. 17. V.N.B. f. 43. 11 Ed. 4. f. 4. 27 H. 8. f. 3. 10 H. 7. f. 11. Fitz. Averment, 16. 26. 43. 45. 47, 48, 49. Regist. 83. 18 Ed. 1. c. 16.)

Here is a maxime of the law recited, *viz. ad officium iusticiariorum spectat, unicuique coram eis placitanti iustitiam exhibere.*

By this chapter there be five mischiefs, or rather abuses of sherifes rehearsed and provided for, which we shall handle in order, as they shall arise in this chapter.

The first mischief was, that the sherife returned not the writs to him directed, but imbezeled the same, and commonly the demandant or plaintife for default of proof was without remedy, or else without the effect of a just remedy being against a sherife, for the which a remedy is provided by this act in manner ensuing.

(1) *Illi qui timent malitiam vicecom' liberent brevicia sua originalia, et iudicialia in pleno com', vel in retiro com' ubi fit collatio denariorum domini regis, et capiatur biletu, &c.*] This branch was taken to be short, for it was no more but *capiatur biletu*, and no commandment to the sherife to receive the writs and to make a bill; but by the statute of 2 E. 3. the sherife and under-sherife are commanded, that they shall receive the said writs, and make a bill, and so throughout.

So as now it is a contempt in the sherife or under-sherife, if he make it not, and in default of them, it shall be also a contempt in the others appointed to seal it, if they refuse.

In this speciall case the demandant or plaintife shall have an action against the sherife for not returning the writ, whereas regularly for not returning of a writ the sherife shall be amerced *quousque*; but for a false return, or for imbezeling of a writ, an action doth lye at the common law against the sherife.

And the demandant or plaintife, if he fear the malice (as this act speaketh) of the sherife, he may cause the sherife or under-sherife to be called into the court, and deliver the writ to him of record, that he may take the benefit of this statute.

See the action brought upon this branch of the statute, in the book of entries Rastall.

2 E. 3. cap. 5.

[452]

26 Aff. 4^o 38
Aff. 13. 42 Aff.
12. 8 H. 6. 1.
1 H. 6. 1. F.N.B.
93. b. 31 E. 3.
Procl. 55.
Regist. 85, 86.
19 H. 6. 29.
Braft. lib. 5. fol.
441. b.

Fol. 501. 626.

(2) *Retro comitatus.*] Is after the county court, as to pleas, be ended; it is holden further, for the collection of the kings money, that is, his green wax.

(3) *Et per istam viam fiat remedium quando vicecomes respondet quod breve adeo tarde venit, &c.*] The second mischief was, the sherife would return a *tarde*, which by this purview is prevented; and so it is if the writ be delivered to the sherife of record, as hath been said.

Bract. li. 5.
fo. 441.

Where Bracton further in the same place saith, *Et unde infniti sunt casus de genere isto ubi vicec' per fraudem rescribit, et prætendit non causam ut causam.*

(4) *Multotiens etiam capiunt placita dilationes per hoc, quod vicec' respondet quod præcepit balivis alicujus libertatis, &c.*] Here is the third mischief, that great delays are used by the false return of sherifes in making of mandates to fained liberties, supposing them to have return of writs, where in troth there be no such liberties, for redresse whereof the remedy followeth.

11 E. 4. 2.

(5) *Quod thesaurarius, et barones de scaccario, &c.*] Albeit it be inrolled in the chancery, that such a man hath return of writs, yet is not that within the purview of this act, for that the record of the court of exchequer is onely prescribed by this act, and therefore a *certiorari* may be awarded out of the chancery to the exchequer to the treasurer, that he bring in the roll of the liberties in his hand to the justices, before whom the return is made.

2 H. 4. 4.

(6) *Omnes libertates.*] This must be understood of a bailife of a franchise or feignory, which have return of writs, and not to a bailife created itinerant, (for example) in the county of S. and to have return of all writs, and execution of the same by the kings letters patents; for such a grant is void, for in effect it taketh away the office of the sherife; and therefore where such a return was made upon a mandate to such a new found bailife, the court was in purpose to have punished the sherife by this branch of this act, *tantum exheredatorem domini regis.*

(7) *Statim puniatur vicecomes tanquam exheredator regis, et coronæ suæ.*] Because he gain a liberty or franchise against the king, to the disherison of the king and of his crown, forasmuch as no man can have such a liberty or franchise but from the crown.

This punishment shall be by ransome and imprisonment.

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(8) *Quæ veraciter retournum habet, qui nihil inde fecit mandetur vicecomiti, quod non omitat.*] Here is the fourth mischief, that where there was indeed a bailife of a liberty, who truly had return of writs, yet he upon a mandat to him would do nothing: remedy is hereby provided, that it shall be commanded to the sherife, *quod non omitat, &c. quin exequatur præceptum domini regis, &c.*

Bract. li. 5. fo.
442. a. Regist.
82. F.N.B. 68. f.
& 74. a.

This branch concerning the *non omitas*, is in affirmance of the common law; and therefore Bracton who wrote before this statute, treating of this matter, saith, *Et quo casu cum balivi nihil inde fecerint, propter defectum eorum, præcipiatur vicecomiti, quod non omitteret propter libertatem talem, quin, &c.*

4 H. 6. 25. b.
5 H. 7. 28.
F.N.B. 74. a.
2 H. 6. 15. Si-
mile, 19 H. 6. 28.
21 H. 6. 28.
8 E. 4. 5. b.
Simile.

(9) *Nihil inde fecit.*] This *nihil* is to be understood, not onely where nothing at all is done, but also where the bailife of the liberty maketh an insufficient return, for that is *nihil* in law; and therefore a *non omitas, &c.* shall be thereupon granted; for *idem est nihil, et insufficienter dicere.*

(10) *Et*

(10) *Et quod scire faciat balivis.*] This seemeth to be added by this branch to the common law.

(11) *Multotiens etiam vic' falsum dant responsum quoad illum articulum de exitibus.*] Now cometh the fifth mischief, that the sherifes would return too small issues, in which case by the common law the plaintife could not have an averment against the return of the sherife; for the sherife is but an officer to the court, and hath no day in court to answer to the party: but this is remedied in this case by this branch.

(12) *Et si offerat verificare, &c.*] Here is the remedy given, and the mean prescribed, how the averment shall be proved, and the plaintife must in his averment alledge what the value of the issues be.

See the book of entries for the judicial writ to the justices of assise.

And where it is here said, *Viccomites falsum dant responsum*, this branch mentioning sherifes extended not to bailifes of liberties, which is holpen by the statute of 1 E. 3.

(13) *A die impetrationis usque diem in brevi contentum.*] These issues, that is, the value of the land must be inquired, from the teste of the writ, untill the day of the return of it; and it is holden, that this act extendeth not to the return of issues upon jurors after issue joyned.

(14) *Et cum inquisitio retorn' fuerit, si de pleno prius non responderit, aueretur de surplusagio, &c.*] As if the sherife return but 10 s. issues, and it be found before the justices of assise, that the issues amounted to 50 s. the sherife shall be charged with 40 s. by this branch, and so after that rate and proportion.

(15) *Et sciat vicecomes, quod redditus, blada in grangia, et omnia mobilia, præter equitaturam, indumenta, et utensilia domus continentur sub nomine exituum.*] By this branch is explained what shall be accounted issues, for the better direction of sherifes in this case, that is to say, not onely the rent and revenue of the land, but the corn in the grange, and all other moveables, as hay in the barn, and other moveable or personall goods whatsoever, except those things belonging to his riding, his apparell and utensils of house: and certainly this is a good and necessary law, if it were put in execution according to the purview of this act.

(16) *Alius non apponat manum quam dominus rex.*] That is, that the delinquent shall be punished *coram domino rege*; that is, in the kings bench, his court of ordinary justice.

(17) *Multotiens etiam falsum dant responsum mandando, quod non potuerint exequi præceptum regis propter resistentiam.*] Now we are come to the sixth mischief, or rather the abuse of sherifes, as by these words, *falsum dant responsum*, appeareth.

(18) *Caveat vicecomes de cætero quia hujusmodi responso multum redundat in decus domini regis, et coronæ suæ.*] Hereby such a return is forbidden.

For this matter, see the exposition upon the statute of W. 1.

(19) *Statim (omnibus omis) assumpto secum possit comitatus sui eat in propria persona ad faciend' executionem.*] This branch is in affirmation of the common law, as appeareth in the exposition upon the said statute of W. 1. where you may read of this matter at large.

Fleta, li. 2. c. 61.

21 H. 7. 8. b.

27 H. 8. 3.

20 H. 6. 25.

22 E. 4. 10.

10 H. 7. 11. a.

Raft. 383.

1 E. 3. cap. 5.
Vet. N.B. fo.

53.

27 H. 8. 3.

20 H. 6. 25.

22 E. 4. 10.

10 H. 7. 11. a. b.

27 H. 8. 3.

Fleta li. 2. ca. 62.

27 H. 8. 3.

24 E. 3. 29.

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Fleta, li. 2. cap. 62.

W. 1. ca. 17.

(20) *Et*

(20) *Et si inveniatur subbalivos suos mendaces.*] This is plain, and needeth no explanation.

(21) *Et si inveniatur eos veraces, castiget resistentes per prisonam, a qua non deliberentur sine speciali præcepto dom' regis.*] This is evident in it self.

Fleta, li. 2. c. 62.

(22) *Et si forte, cum venerit, resistantiam invenerit.*] Albeit by the penning of this act it may seem, that the sherife should take *posse comitatus* after complaint made, *post querimoniam factam*; yet seeing he may take *posse comitatus* by the common law, he may either take it *post, vel ante querimoniam*.

But he must take it after resistance, and not before, for *sequi debet potentia justitiam, non præcedere*.

16 R. 2. ca. 5.

(23) *De nominibus resistantium, auxiliantium, consentientium, præcipientium et fautorum, et per breve de judicio attachientur.*] *Fautorum*; this word is of a large extent, whereof you may read in the statute of 16 R. 2. and in English it properly signifieth a favourer.

(24) *Secundum quod domino regi placuerit.*] That is, according to that which shall be upon due proceeding adjudged *coram rege*, in the kings court of justice.

Magna Charta,
cap. 29.

(25) *Nec intromittat se aliquis minister domini regis, &c. quia dominus rex hoc sibi specialiter reservat.*] That is, as hath been said, that the delinquents shall be punished *coram rege*, in his court of justice; for no man can be punished by absolute power, but *secundum legem, et consuetudinem Angliæ*, as hath been said before in the exposition of *Magna Charta*, and elsewhere hath been often said.

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C A P. XL.

CUM quis alienat jus uxoris suæ, concordat' est quod de cætero secta mulieris, aut ejus hæredis (1) non differatur post obitum viri per minorem ætatem hæredis, qui warrantizare debet (2), sed expectet emptor (3) (qui ignorare non debuit quod jus alienum emit) usque ad ætatem warranti sui (4), de warrantia sua habenda (5).

WHERE any doth aliene the right of his wife, it is agreed, that from henceforth the suit of the woman, or her heir, after the death of her husband, shall not be delayed by the nonage of the heir that ought to warrantise, but let the purchaser tarry, which ought not to have been ignorant that he bought the right of another, until the age of his warrantor, to have his warranty.

(Fitz. Age, 47. 76. 126. 138. Fitz. Voucher, 180. 183. 226. 305. Raft. 139. 2 Leon, 148.)

The mischief before this statute was, that when the husband aliened the right of his wife, this working a discontinuance, and the wife driven to her *cui in vita*, or her heir to his *sur cui in vita*, those just actions were delayed oftentimes, when the purchaser vowed the heir of the baron being within age, untill his full age, which is remedied by this act.

18 E. 4. 16.

14 H. 7. 19.

And this act restraineth the common law, and therefore it is taken *stricti juris*, as shall appear in the exposition hereafter.

(1) *De*

(1) *De cætero seßa mulieris aut ejus hæredis.*] This suit of the wife or her heire extendeth onely to a *cui in vita*, or a *sur cui in vita*, which are the proper actions upon an alienation made by the baron of the right of his wife, the former words being [*cum quis alienat jus uxoris sue*,] for if the wife be tenant in taile, and the baron aliened in fee and died, and the wife died, the issue in taile cannot have a *sur cui in vita*, but he must have his formedon in the discender by the statute of W. 2. cap. 1. and in this action the purchaser may vouch the heire of the baron, and for his nonage the paroll shall demurre, for that action is out of this statute.

46 E. 3. age 76.

(2) * *Per minorem ætatem hæredis qui warrantizare debet.*] This by the context of this act extendeth onely to the heire of the baron who made the alienation, and therefore the heire of a stranger is out of this statute.

† The baron aliens to A. hath issue two daughters and dies, the wife brings a *cui in vita* against A. who vowcheth the daughters as heirs to the baron, whereof the one onely was within age, the paroll shall not demurre; although all the coparceners, which make but one heire, are not within age, and the words *per minorem ætatem hæredis*, yet seeing by the common law the paroll for the whole should have demurred, judgement shall be given for the demandant, and the tenant shall attend for his warranty for the whole in this case, until the full age of the coparcener, that then is within age.

(3) *Sed expectet emptor.*] As the actions, wherein the voucher shall be, and the heire to be vouchered are set downe in certaine, so the person that is to vouch is also specified, so as if any other vouch the heire of the husband, the paroll shall demurre for his nonage, and therefore the purchaser or buyer of the husband is onely he, by reason of this word *emptor*, that is bound by this statute.

Therefore this *emptor* must have three properties:

1. He must be *emptor*, that is, purchaser immediately from the baron, and therefore if this *emptor* alien in fee, the alienee is *emptor*, that is a purchaser, but because he is not the immediate purchaser from the baron (albeit he may vouch the heire of the baron as assignee) yet is not hee bound by this statute.

(2) He that is an *emptor* within this act must be the tenant in deed against whom the *cui in vita*, or *sur cui in vita* is brought, and therefore in the case before, if the second alienee vouch him that was immediate *emptor*, yet if he vouch the heire of the husband, the paroll shall demurre for his nonage, and the demandant shall not have judgement *maintenant*, because the *cui in vita*, &c. was not brought against him that was immediate *emptor*, as tenant in deed of the land, but he came in as vouchree; so it is if he that was immediate *emptor* commeth in by receipt upon default of tenant for life, he is not bound by this act, *causa qua supra*.

3. ^a He must be *ipse emptor*, and not *alter ipse*, and therefore if the immediate *emptor* dieth, albeit his heire sitteth in his auncessors seate, and is *alter idem*, yet is not the heire bound by this act, because hee is not *ipse idem*.

^b Now what estate an *emptor* shall have, he that purchaseth any estate of freehold, be it in fee-simple, fee-taile, or for life, he is an *emptor* or purchaser within this act, and yet the words of this act be, *qui alienat jus uxoris sue*.

* Contr. judicat in 14 E. 1. in Banco Rot. 81. Buck. The later authorities have over-ruled the judgement given the next yeare of the statute.

7 E. 2. age 139.

46 E. 3. ib. 76.

6 E. 3. 46.

17 E. 3. 59.

Lib. 1. fol. 15.

Sir William

Perhams case.

Lib. 4. fol. 50.

A. Ognels case.

Li. 6. fo. 5.

Markal.

† 3 E. 2.

voucher 210.

8 E. 2. judgement

240.

7 E. 2. age 139.

6 E. 3. 49.

Pl. Com. 17. 47.

[456]

20 E. 2. age 126.

19 E. 3. ib. 2.

9 E. 3. 4.

18 E. 4. 16.

Vide Mich.

14 E. 1. ubi sup.

adjudged that

this statute ex-

tendeth to the

second vouchree,

but the later

books are to the

contrary in this

point also.

^a 16 E. 3. age 47.

47 E. 3. ib. 76.

14 H. 7. 19.

^b 3 E. 2. vouchree

210. 8 E. 2.

judgement 140.

Glouc. cap. 3.

For

For this word [*alienare*] see the statute of Glouc' and the next chapter ensuing.

Also if the baron alien, though it be for no valuable consideration, yet is he an *emptor*, that is a purchaser within this statute.

3 E. 2. voucher
210. 8 E. 2.
judgement 140.
Raft. fol. 135.

(4) *Usque ad ætatem warranti sui.*] And at the full age of the vowchee the tenant shall sue a resummons.

For the order of proceeding herein see the booke of entries.

3 E. 2. ubi supra.
8 E. 2. ubi supra.
9 E. 3. 4. 6 E. 3.
46. 32 H. 8.
cap. 28.

(5) *De warrantia sua habenda.*] This act doth extend as well to a warranty in law, for example, in respect of a reversion, &c. as to a warranty in deed. And albeit the stat. of 32 H. 8. doth notwithstanding the alienation of the husband, &c. give to the wife and her heires a right to enter, as by that act appeareth, so as the wife or her heires are not driven to their action, as at the time of the making of this act they were, and therefore this act may seeme to some to be of no great use, yet for divers points of notable learning, and for the discussing of like cases standing upon like reason, as you have perceived, wee held it very profitable and necessary to be explained.

C A P. XLI.

STATUIT dominus rex, quod si abbates, priores, custodes hospitalium, et aliarum domorum religiosarum (1) fundatarum ab ipso, vel à progenitoribus suis (2) alienaverint (3) de cætero tenementa domibus ipsis ab ipso vel à progenitoribus suis collata (4), tenementa illa in manum domini regis capiantur (5), et ad voluntatem suam teneantur, et emptor amittat suum recuperare, tam de tenementis quam de pecunia, quam paiauit. Si autem domus illa à com', baron' vel ab aliis fundat' fuerit (6), de ten' sic alienat' (7) habeat ille, à quo vel à cuius antecessore ten' sic alienat' collatum fuerit, breve ad recuperand' (9) ten' illud in dominico, quod tale est:

OUR lord the king hath ordained, that if abbots, priors, keepers of hospitals, and other religious houses founded by him or by his progenitors, do from henceforth aliene the lands given to their houses by him or by his progenitors; the land shall be taken into the king's hands, and holden at his will, and the purchaser shall lose his recovery as well of the lands, as of the money that he paid. And if the house were founded by an earl, baron, or other persons, for the lands so aliened, he from whom, or from whose ancestor the land so aliened was given, shall have a writ to recover the same land in demesne, which is thus:

Præcipe tali abbati, quod iuste, &c. reddat B. tale ten' quod
[457] *eidem domui collatum fuit in liberam eleemosynam (8) per præd' B. vel antecessores suos, et quod ad prædict' B. reverti debet per alienationem, quam prædict' abbas fecit de prædicto ten' contra formam collationis prædictæ, ut dic'.*

Eodem modo de ten' dat' pro cantaria sustinenda vel luminari in aliqua ecclesia vel capella, vel alia eleemosyna sustentanda

In like manner for lands given for the maintenance of a chantery, or of light in a church or chapel, or other alms

sustentanda, si ten' sic dat' alienetur (10). *Et si forte ten' sic dat' (12) pro cantaria, luminari, pastu pauperum, vel alia eleemosyna sustentanda vel faciend', non fuerit alienat', sed subtrahita fuerit hujusmodi eleemosyna per biennium (11), competat actio donatori aut ejus hæredi (13) ad petendum tenement' sic datum in dominico, sicut statutum est in statuto Glocest' (14) de tenementis dimissis ad faciendum vel reddendum quartam partem valoris tenement', vel majorem.* Gloc. cap. 4.

alms to be maintained, if the land given be aliened. But if the land so given for a chantery, light, sustentance of poor people, or other alms to be maintained or done, be not aliened, but such alms is withdrawn by the space of two years, an action shall lie for the donor or his heire to demand the land so given in demean, as it is ordained in the statute of Gloucester for lands leased to do or to render the fourth part of the value of the land, or more.

(12 Rep. 72. 1 Roll, 166. Regist. 238. Fitz. Brief, 291. Fitz. Cessavit, 15. 18. 24. 44. St. 6 Ed. 1. c. 4. 11 Rep. 63.)

At the common law, as it appeareth by Glanvill, *Nec episcopus, nec abbas, quia eorum baronie sunt de eleemosyna domini regis, et antecessorum ejus, non possunt de dominicis suis aliquam partem dare ad remanentiam sine assensu et confirmatione domini regis.* Glanv. l. 7. ca. 1.

The meaning whereof is, that seeing those that hold of the king *per baroniam*, did hold of the king in capite, that therefore, by his opinion, they could not alien any part thereof without the kings assent; but yet if the bishop with the assent of his chapter, or the abbot with the assent of his covent, and the like, had aliened the land, the estate of the alienee could not have been avoided.

Li. 5. fo. 10, 11.
de jure regis
ecclesiastico.

See the charter of H. 1. of the foundation of the abbey of Reading in the 26. yeare of his raigne, wherein you shall reade, *Qui autem, Deo annuente, canonica electione abbas substitutus fuerit, non cum suis secularibus consanguineis, seu quibuscumque aliis, eleemosynas monasterii male utendo disperdat, sed pauperibus, et peregrinis, et hospitibus suscipiendis curam gerat, terras censuales non ad feudum donet.*

So as no doubt the alienation was against the minde of the founder, *et contra formam donationis*, yet they having a fee-simple, the common law restrained them not from alienation, *concurrentibus his quæ in jure requiruntur.*

So as the mischief was, when the alienation was a barre to the successor.

(1) *Si abbates, priores, custodes hospitalium, et aliarum domorum religiosarum.*] Seeing this act beginneth with abbots, &c. and concludeth with other religious houses, bishops are not comprehended within this act, for they are superiour to abbots, &c. and these words [other religious houses] shall extend to houses inferiour to them that were mentioned before.

Also bishops are not properly religious, that is, regular, but secular: but yet this act doth referre to inferiour houses that are ecclesiasticall and secular, as hereafter in this chapter shall appeare.

See the first part of the Institutes, sect. 133.

See Brook tit. Alienation 15.

(2) *Fundatarum ab ipso, vel à progenitoribus suis.*] Albeit he that giveth the first land upon raising and creation of the house be

40 E. 3. 27.
46 E. 3. for-
feiture 18.
li. 2. fo. 46.
Levesq; de
Cant. case.
2 Mar. Dier,
109. 33 H. S.
cap. 30.
34 & 35 H. S.
c. 15. Art. super
Chart. cap. 11.
Vide h'c postea,
cap. 47.
33 E. 3. aide le
Roy 103.
the F.N.B. 211. b.

the founder, though it be much lesse then the lands after given to the house in *liberam elemosynam*, yet this act doth extend not onely to lands *ratione fundationis*, but also to lands *ratione dotationis*, so they were given in *liberam elemosynam*. *Vide* hereafter in this chapter.

40 E. 3. 27.
F.N.B. 211.
Vet. N.B. 142.
46 E. 3. for-
seiture 18. ca-
pit. escheat
Vet. Mag.
Chart. 161.

(3) *Alienaverint.*] This act speaketh of an alienation made by abbots, &c. but it must be intended of alienations with the assent of the covent, or else the successor might recover the same by a writ of entry *sine assensu capituli*; for where acts of parliaments give remedy, it is ever intended that it shall not be illusory.

And albeit this act speaketh of the abbots that alien, it is understood when the abbots alien with consent, as is aforesaid, thereby is a right vested in the king; and albeit the abbot dieth, yet the king may have an office to finde his right, and recover the land in the time of the successor; and so may a common person have remedy in that case, as shall be said hereafter.

See the books
last before men-
tioned.

And some have said, that this alienation is intended when the alienation is in fee, and not when the estate is made but for life, or in taile; but then should the statute bee of small effect, for then might hee make many gifts in taile, or multiply leases for many lives, without reserving the accustomed rent, and thereby utterly overthrow the house, as in former times it hath done.

Hil. 38 E. 3.
Rot. 14. Coram
rege Abbot de
conleys case.

As you may reade that it was found by inquisition in the raighe of E. 3. that Thomas de Pipe, abbot of the monastery of Stonely, in the county of Warwick (of the foundation of king Henry fitz Empressie (which was H. 2.) and that he gave to the said house in *liberam elemosynam*, the mannor of Stonely in the said county) *alienavit diversis hominibus particulariter, prout patet inferius, viz. Isabellæ de Benefhale concubinæ dicti abbatis, et Johanni filio eorundem abbatis et Isabellæ primogenito filio unum messuagium, et unam carucatam terræ, et decem mercatus redditus cum pertin' in Fynham. Habendum et tenendum ad terminum vitæ eorundem Isabellæ et Johannis absque aliquo inde reddendo annuatim: and found also divers other leases for lives of parts of the said mannor made to divers persons, to and for the benefit of the said abbot, and of his concubine, and of her and his bastards; but it is best to use the words of the record it selfe, Absq; aliquo inde reddendo vel præ manibus inde de eisdem percepto sed tantummodo ad opus et proficuum ipsius abbatis, et maxime pro sustentatione et inventione prædictæ Isabellæ et puerorum eorundem abbatis et Isabellæ, qui excedunt numerum monachorum suorum missas celebrantium, si forte deponeretur de statu suo, &c.*

45 E. 3. 18.
F.N.B. 211.

Sometime *alienare* is taken for *alienum facere*, and therefore if land be recovered in value, &c. the founder shall have a writ of *contra formam* within this statute.

7 H. 6. 2.

If the abbot with consent of the covent doth charge the land, this is not within this act, for no land or tenement is aliened.

F.N.B. 211.
Rogist.

(4) *Collata.*] Lands and tenements given in free almoigne after the foundation *ratione dotationis*, are within this word [*collata*] which extendeth as well to lands *ratione dotationis*, as to lands *ratione fundationis*.

13 H. 7. 5. 3.
45 E. 3. 18.
Stamf. Prer.
F.N.B. 212.

(5) *In manum domini regis capiantur.*] The king in this case must have an office found for him, and a *seire fac'* against the tertenant, by the intendment and construction of this act, for all necessary incidents are to be understood, and in the *seir' fac'* the tertenant is not concluded by any trial had against the abbot.

(6) *Si*

(6) *Si autē domus illa à comite, barone, vel aliis fundata fuerit.* Having provided remedy when the king was founder, now this act provideth when a subject is founder.

(7) *Tenementum sic alienatum.*] These words couple all that hath bene said before to this branch.

(8) *Collatum fuerit in liberam elemosinam.*] So as of necessity the lands and tenements within the purview of this act must be given in frankalmoigne, for so be the words of the writ framed and formed by this act.

Fleta treating hereof, saith, *Alia est causa cum res datur in elemosinam, et alienatur, in quo casu processum fuit quod breve de ingressu ad recuperandum hujusmodi tenementum alienatum in dominico. Vide capit' Eichaetrie, Ver' Magna Charta 161.*

(9) *Habeat, &c. breve ad recuperandum.*] This branch saith, *habeat breve*: but what if the alienation be of such a tenement or hereditament, as there lieth no writ of *contra formam collationis*? As for example, if an advowson be aliened *contra formam collationis*, the founder shall present, because he can have no writ; for when a right is given, the law with it will give a remedy. So as this act is to be understood, that his remedy shall be by writ, where a writ doth lye.

After a recovery had by force of this writ against the abbot, there must be a *scire fac'* (as hath been said) against the tenant of the land, who is not concluded by any triall, &c. had against the abbot, &c.

Vide 32 E. 3. tit. Breve 291. for the form of this writ.

The heir shall have this writ for an alienation in the time of his ancestor, for the right of action once vested in the ancestor cannot dye.

This writ also lieth against the successor for an alienation made by the predecessor, notwithstanding these words in the writ, *prodictus abbas*; or the heir may have an action against the successor.

• This action of *contra formam collationis* consisteth onely in privacy for none but onely for the founder, or donor, or his heir, and not for any stranger.

(10) *Eodem modo de tenemento dato pro cantaria sustentia, vel luminari in aliqua ecclesia, seu capella, vel alia elemosina sustentanda, si tenementum sic datum alienatur.*] *Elemosina*: 1st the first part of the Institutes, sect. 133, &c. et le Customier de Norm. cap. 32. *Tenere per omnes, et le latin com' sur ces.*

This is a clause of reference, *eodem modo*, &c. But this clause extendeth not to the lands or tenements parcell of the foundation of the abbey, or priory; for the former branches of this act had made sufficient provision for them.

But this clause extendeth to lands or tenements given to any ecclesiasticall person, that is, either religious, as abbots, priors, &c. or secular, as parsons of churches, deans, &c. for the finding of a chauntry priest, or of a light, or any other charitable or alms-deeds, or when a chauntry is incorporated, and lands given for maintenance of the same.

And this branch being generall, *viz. De tenemento dato pro cantaria*, &c. the same extendeth aswell to bishops, and all other secular persons, or ecclesiasticall, as religious, consisting of one sole person, or aggregate of many: and so note the difference between this and the former branch, and the severall reasons of the same.

32 E. 3. contr' collat. 3.

[459]

Regist. 133.
F.N.B. 217. 2.
1. Part of the Institutes, sect. 133, 134.
What Free almsmoigne is.
Fleta, lib. 5. cap. 24.

32 E. 3. Contra formam collat. 3.
F.N.B. 217. 2.
32 E. 3. Testavit 24. Fleta, lib. 5. cap. 34.
For this writ.

32 E. 3. Bre. 291. 17 E. 3. Contra formam collat. 3. 32 E. 3. Bre. 291. 2 H. 4. 11. F.N.B. 217. Regist. 133. Ver' N.B. 217. Lib. 5. de Rast. 126. See the last clause of this chapter.
• 7 R. 2. Constitut. 13. F.N.B. 211.

7 H. 4. 20.

10 H. 6. 3. b.

Regist. 133.
F.N.B. 209. 2.

18 E. 3. 5. a.
32 E. 3. Pl. 291.
cap. Michael.
Vet. Magn.
Chart. 162.
See the first part
of the Institutes,
sect. 137.

* [460]
Regist. 238.
F.N.B. 209. k.
capit' Michael.
Vet. Magna
Charta. 162.
1 part of the
Institutes,
sect. 137.
7 H. 4. 20.
F.N.B. 210. E.
7 E. 4. 11. per
Careby.
1. part of the
Institutes,
sect. 137.

11 R. 2.
View 65.

1. part of the
Institutes, sect.
136, 137.

1. part of the
Institutes, sect.
137 F.N.B.
210. E.

F.N.B. 209. k.
Pl. Com 58. b.
12 H. 4. 24.
14 H. 4. 4.

By these words [*ecodem modo*] if lands were given to an abbot, *pro cantaria sustinenda, aut pro pastu pauperum*, or other such service in certain; and the abbot aliened with consent of the convent, yet the *contra formam collationis* did lye against the abbot upon this branch, by reference to the former branch.

(11) *Et si forte tenementa sic data, pro cantaria, luminari, pastu * pauperum, vel alia elemosina sustinenda, vel facienda, non fuerit alienata, sed subtrahenda fuerit lapsusmodi elemosine per biennium.*] By this branch is a cessavit given, where lands were given to finde a chaplein to sing divine service, or to finde a light in such a church, &c. or to distribute certain bread and beer every day, week, or month to poor people, &c.

(12) *Tenementa sic data, &c.*] This branch extendeth not to a gift in tail, for the donor shall not have a cessavit within this statute.

It is holden, that this branch concerning the cessavit, extendeth not to lands or tenements given by the founder upon the foundation of the house; albeit, as it appeareth by the said charter of H. 1. the lands were generally given, not onely for celebration of divine service in the church, &c. but for sustentation of poor people, or other aimes deeds, which are also adjudged in law divine service.

And this clause, that giveth the cessavit, referreth onely to the last branch concerning chauntries, lights, and other particular almes deeds, and not to the former branch concerning the foundations and dotations in *libera elemosina* in generall; for this branch extendeth not at all to lands given in free almoigne, as the first and second clauses did, for in free almoigne no certain service is to be done, and therefore for them no cessavit can lye, but lyeth onely where particular divine services are mentioned.

Note here the excellent judgement of the makers of this act, for they, for alienation of lands given in free almoigne, that is, for celebration of divine services, &c. incertain, gave a *contra formam collationis*, but gave no cessavit for cessar, because no cessavit could lye for divine service incertain; but for divine service certain, both a *contra formam collationis*, and a cessavit respectively by this act doth lye, aswell as an avowry for the same at the common law.

(13) *Competat actio donator, aut eius heredi.*] In this case the heir shall upon this branch have a cessavit *pro pastu pauperum*, for the cessar done in the life of his ancestor, but so shall not the heir of the lord in a cessavit upon the statute of Gloucester: and the reason of the diversity is, for that in a cessavit brought upon this branch *de pastu pauperum*, no tender of the arrerages shall be by the tenant to the demandant, because they belong to the poor, and never belonged to the demandant or his ancestor; but the rent and service upon the statute of Gloucester belonged to the lord to whom the tender was to be made, but his heir is out of that statute, because the tender of the arrerages in the life of the ancestor belonged not to him.

(14) *Sicut statutum est in statuto Glouc.*] Although this branch hath a reference to the statute of Gloucester, yet it is to be understood, to extend to such clauses of that act, as may stand with reason of law and conveniencie, as you perceive by an example before remembred, *et j.c. de similibus.*

C A P. XLII.

DE marescallis domini regis (1) de feodo camerariis (2), custodibus hostiorum in itinere justic', et servientibus virgam portantibus coram justic' apud Westm', qui officium illud habeant de feodo (3), et qui plus exigunt ratione feodi sui quam exigere consueverunt, secundum quod multi queruntur super eis qui statut' cur' à multo tempore viderunt et sciunt, dominus rex inquiri fecit, quem stat' prædict' ministri de feodo habere consueverunt temporibus retroactis, et per inquisitionem (4) statuit et præcepit, quod marescallus de feodo qui de novo exigit palefridum (5) de comitibus, baronibus, et aliis per partem baroniæ tenent', quando homagium fecerint, et nihilominus ad malitiam eorum alium palefridum, et de quibusdam (de quibus palefridum habere non debuit) palefridum de novo exigunt, ordinavit quod prædictus marescallus de quolibet comite et barone (integram baroniam (7) tenente) de uno palefrido sit contentus (6), vel de precio quale antiquitus percipere consuevit (8), ita quod si ad homagium, quod fecit, palefridum vel precium in forma prædicta ceperit, ad malitiam suam nihil capiat;

Et si fortè ad homagium nihil ceperit, ad malitiam suam capiat. De abbatibus et prioribus integram baroniam tenentibus, cum homagium aut fidelitatem pro baroniis suis fecerint, capiat palefridum vel precium, ut prædictum est.

Hoc idem de archiepiscopis, et episcopis observand' est. De his autem qui partem baroniæ tenent, sive sint religiosi, sive seculares, capiat secund' portionem partis baroniæ, quam tenent (9). De religiosis tenent' in liberam eleemosinam

CONCERNING the king's marshals of fee, chamberlains, porters in the circuit of justices and serjeants bearing vierge before justices at Westminster, which have the same office in fee, and that ask more by reason of their fee than they have used to ask, whereupon many do complain on them, that have known and seen the order of the court of long time; our lord the king hath caused to be enquired by an inquest what the said officers of fee have used to have in times passed, and hath ordained and commanded, that a marshal of fee, which of new asketh a palfray of earls, barons, and other holding by a part of a barony when they have done homage, and nevertheless another palfray when they are made knights, and of some that ought not to give any, ask a palfray: it is in like manner ordained, that the said marshal of every earl and baron, holding by an entire barony, shall be contented with one palfray, or with the price of it, such as he hath used to have of old; so that if he took a palfray, or the price of one, at the doing of his homage in form aforesaid, he shall take nothing when he is made knight;

And if he took nothing at the doing of his homage, when he is made knight he shall take. Of abbots and priors holding an whole barony, when they do homage or fealty for their baronies, he shall take one palfray, or the price, as afore is said.

And this shall also be observed amongst archbishops and bishops. Of such as hold but a part of a barony, whether they be religious or secular, he shall take according to the portion of the part of the barony

elemosinam, et non per baroniam, vel partem baroniæ, nihil de cætero exigat marescallus.

Et concessit dominus rex, quod per hoc statutum non præcludatur marescallus suus de feodo in plus petendo, si imposterum ostendere poterit, quod jus habeat plus petendi (10).

Camerarii domini regis habeant de cætero de archiepiscopis (11), episcopis, abbatibus, prioribus, [462] et aliis personis ecclesiasticis, comit', baron', integram baroniam teneant', rationabilem fidem cum homagium aut fidelitatem pro baroniis suis fecerint. Et si per partem baroniæ teneant, capiant rationabilem finem secundum portionem ipsos contingentem. Alii vero abbates, priores, religiosi, et seculares non tenentes per baroniam, vel partem baroniæ, non distringantur ad finem faciend' (12), secundum quod de tenentibus per baroniam vel partem baroniæ dictum est, sed sit camerarius de superiori indumento contentus, vel de precio indumenti: quod plus honestè dictum est pro religiosiis quam secularibus, quia honestius est, quod religiosi faciant pro superiori indumento, quam exuant.

that they hold. Of religious men that hold in free alms, and not by a barony, nor part of a barony, the marshal from henceforth shall demand nothing.

And our lord the king hath granted, that by this statute a marshal of fee shall not be barred hereafter to demand more, if he can shew that he hath right unto more.

The king's chamberlains from henceforth shall have of archbishops, bishops, abbots, priors, and other persons spiritual, of earls and barons holding an entire barony, a reasonable fine when they do their homage or fealty; and if they hold by a part of a barony, they shall take a reasonable fine according to the portion to them belonging. Other abbots, priors, and other persons spiritual and temporal, that hold no entire barony, nor part of a barony, shall not be distrained to make fine, as it is said by them that hold by a barony, or part of a barony, but the chamberlain shall be contented with his upper garment, or with the price thereof; which is done in favour of persons religious more than of lay persons; for it is more convenient that religious men should fine for their upper garment, than to be stripped.

W. 1. cap. 40.

The mischief before this statute was, that not onely the marshal, and the chamberlein of the kings house, but some inferiour officers, as the porters, or door-keepers of the justices in eyre; and likewise the bearer of rods or staves before the justices at Westminster, did extort of the subject excessive fees, more then was due to them: whereupon many that of long time had known the kings court, and other the said courts, did greatly complain; for remedy whereof this act was made; the particular mischiefs shall be specified in their due places.

The statute of W. 1. had provided against the extortion by serjeants, cryers, and marshals of justices in eyre, and or other justices; now this act provideth against the officers following.

(1) *De marescallis domini regis.*] This is intended of the marshal of the kings house. Of this officer Britton saith thus, *Et que le mareschal de nostre hostele teigne nostre lieu deins la vierge de nostre hostie, &c.* The steward of the kings house and this marshall have a court of justice, as elsewhere we have shewed.

Brit. fo. 1. b.
1. part of the Institutes, sect.
cap. Grand Serjeanty.
Fleta, li. 2. c. 3,
4, 5. Lib. 10.

fo. 68, &c. Lib. 6, fo. 20, 21. Lib. 7. fo. 17. Fleta, li. 2. c. 6.

(2) *De*

(2) *De camerariis.*] This is also intended of the chamberlein of the kings house. The l. chamberlein of the kings household is a great officer of the kings house, so called because his office doth principally concern the chambers, that is, matters above the stairs; of his office, Fleta writeth thus, *Camerarius autem, et sub-* Fleta, ubi supra.
ministri cameræ a jurisdictione sen', et mar' exempti sunt, veluti omnes
garderobarii, ut in quibusdam; non enim extendit se jurisdictio sen' ad
modica dicta camerariorum, vel garderobiariorum audienda, vel ter-
minanda, eo quod ex consuetudine hostii sunt exempti, dum tamen illi
de quibus exigi contigerit cur' coram senesch', cameris regis et reg-næ,
ac garderobæ assidue sint intendentes; sed coram ipsis thesaur' et ca-
merar' audiantur querimonie de huiusmodi ministris et subditis suis, et
terminabuntur, præsentem tamen clericum regis ad placita aula deputato;
ita quod de finibus, et amerciamen' ex huiusmodi placitis convenientibus
nihil regi depereat. Debet enim camerarius decenter disponere pro lecto
regis, et ut cameræ tapetis, et banqueriis ornentur, et quod ignes suffi-
cienter fiant in caminis, et providere ne ullus defectus inveniatur qua-
tenus officium suum contigerit. Observe here, what anciently be-
 longed to the office of the chamberlein of the kings household.

(3) *De feodo.*] These words are not onely meant of them that have a fee simple in their offices, but such as have any fixed estate, either in tail or for life, and so are these words intended throughout this act; and the office of the chamberlain of the household was never granted in fee: and some do hold, that the sense of these words [*de feodo*] are such officers as have fees due, and belonging to them.

(4) *Per inquisitionem.*] Observe here, that before the king, the lords and commons made this law, the king did inquire by oath of a jury sworne of the truth and certainty of the fees hereafter in this act set downe.

(5) *Quod marescallus de feodo qui de novo exigit palefridum, &c.]* Before this act the marshall of the kings house claimed and did take for his fee of every earle, baron, and of others holding by part of a barony, when they did their homage, his palfrey; and notwithstanding, when they were made knights, did challenge and take another palfrey; wherein he did wrong in two respects:

1. That in that case hee tooke two palfreyes where hee ought to take but one.

2. That he tooke one of them, that held by part of a barony, both which are remedied by this act.

(6) *Prædictus marescallus de quolibet comite et barone integram baroniam tenente de uno palefrido sit contentus, &c.]* So as by this act he ought to have but one palfrey, both at his doing of homage, and at his making of knight.

(7) *Per integram baroniam.*] What a whole barony is, and of how many knights fees it consisteth, hath been before shewed, Magna Charta, cap. 2. Mag. Chart. c. 2.

And if one had divers baronies, yet seeing that he was but one person, the marshall should have but one horse, *de uno palefrido sit contentus*: and so it is of one that is made knight, though he hath many knights fees.

(8) *Vel de precio quale antiquitus percipere consuevit.]* That we may say once for all, the auncient price of the horse of every archbishop, bishop, abbot, prior, earle, or baron holding by an entire barony is x. l. Ex pervertu' Manuscript.

Also the auncient price of the horse of one that is made knight, or that doth homage, having no part of a barony, is v. marks.

4 H. 4. cap. 23.

See the statute of 4 H. 4. cap. 23.

(9) *De hiis qui partem baroniæ tenent, siue sint religiosi, siue seculares, capiat secundum portionem partis baroniæ.*] As for example, if he hold by halfe a barony, he shall pay v.l. which is halfe the price of the horse of him, that holdeth by an entire barony, and so according to rate of the value of the horse, &c.

But the marshall shall take nothing of religious or ecclesiasticall persons that hold *in liberam elemosynam, et non per baroniam, nec per partem baroniæ.*

(10) *Non præcludatur marescallus de feodo in plus petendo, si in posterum ostendere poterit quod jus habet plus petendi.*] Here is a saving for the marshall of his right of demanding other fees upon better prooffe made; but at the making of this act it appeared by the said inquisition, that no other fees were due to him, then are here exprested; but note there is no saving for the chamberlain.

(11) *Camerarii domini regis habeant de cætero de archiepiscopis.*] The kings chamberlaine, that is, the chamberlain of the kings household shall have a reasonable fine, when any ecclesiasticall or lay person, holding by an entire barony, doe his homage or fealty, and of them that hold by part of a barony a reasonable fine according to the portion which they have.

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So as nothing is due to the kings chamberlain when one is made knight, as it appeareth by the context of this.

(12) *Alii vero abbates, priores religiosi et seculares non tenentes per baroniam vel partem baroniæ non distringantur ad finem faciend.*] They which hold not by a barony, nor part of a barony shall yeeld no fine to the chamberlain, but the chamberlaine of them shall have their uppermost garment, or the price thereof; and it is more honest for the chamberlain to take the price in that case of the ecclesiasticall person, then of the secular, and the reason is there rendered, *quia honestius est, quod religiosi solvant pro superiori indumento, quam exantur.*

C A P. XLIII.

PROHIBEATUR de cætero hospitalariis et templariis (1), ne de cætero trahant aliquem in placitum coram conservatoribus privilegiorum suorum de aliqua re, cujus cognitio spectat ad forum regium (2): quod si fecerint, primo restituant damna parti gravata, et versus dominum regem graviter puniantur (3). Prohibet etiam dominus rex conservatoribus privilegiorum eorumdem, ne de cætero (ad instantiam hospitaliariorum, templariorum, aut aliorum privilegiatorum) (4) concedant citationes, priusquam ex-

BE it prohibited from henceforth to hospitallers and templars, that hereafter they bring no man in plea before the keepers of their privileges for any matter, the knowledge whereof belongeth to the king's court; which if they do, first, they shall yield damages to the party grieved, and be grievously punished unto the king. The king also prohibiteth to the keepers of such privileges, that from henceforth they grant no citations at the instance of hospitallers, templars, or other persons privileged, before it be

primatur super qua re fieri debeat citatio (5). Et si viderint hujusmodi conservatores, quod petatur citatio de aliqua re, cujus cognitio spectat ad forum regium, hujusmodi conservatores nec citationem faciant, nec cognoscant. Et si aliter fecerint (6) conservatores (7), respondeant parti læsæ de damnis, et nihilominus versus dominum regem graviter puniantur. Et quia hujusmodi privilegiati imitentur conservatores, subpriores, præsentatores, sacristas, religiosos, qui nihil habent (8) unde læsis, aut domino regi satisfacere possint, qui audaciosiores sint (9) ad lædendū dignitatem domini regis (10) quam eorum superiores, quibus per eorum temporali pœna potest infligi: caveant de cætero prælati hujusmodi obedientiariorum, ne permittant obedientarios suos assumere sibi jurisdictionem in præjudicium domini regis et coronæ suæ. Quod si fecerint, pro facto ipsorum respondeant suis superiores, ac si de proprio facto suis convicti essent (11).

be expressed upon what matter the citation ought to be made. And if the keepers do see that a citation is required upon any matter, the knowledge whereof belongeth to the king's court, the keepers shall neither make nor knowledge the citation. And if the keepers do otherwise, they shall yield damages to the party grieved, and nevertheless shall be grievously punished by the king. And forasmuch as such persons privileged, depute keepers, sub-priors, chantours, sextons, which be religious men, and which have nothing to satisfy the parties grieved, nor the king; which be more bold to offend the king's dignity than their superiors, to whom punishment may be assigned by their temporalities. Let the prelates of such obedientials therefore beware from henceforth, that they do not suffer their obedientials to usurp any jurisdiction in prejudice of the king and his crown; and if they do, their superiors shall be charged for their fact, as much as if they had been convict upon their proper act.

(Regist. 39.)

(1) *Prohibeatur de cætero hospitalariis et templariis.* The hospitallers and temp'ars had divers great liberties and priviledges, and amongst the rest they held an ecclesiasticall court before a canonist or some of the clergy whom they termed *conservatores privilegiorum suorum*, which judge having in deed more authority then was convenient, yet did he dayly in respect of the height and greatnesse of these two orders, and at their instance and direction, incroach and hold plea of matters determinable by the common law, for *cui plus licet quam par est, plus vult quam licet*; and this was one great mischief.

Another mischief was that this judge likewise at their instance in cases, wherein he had jurisdiction, would make generall citations, as *pro salute animæ*, and the like, without expressing the matter, whereupon the citation was made, which also was against law, and tended to the grievous vexation of the subject, both which mischiefs, or rather abuses are remedied by this act.

(2) *Cujus cognitio spectat ad forum regium.* This branch is in affirmance of the common law.

(3) *Quod si fecerint, primo restituant damna parti gravatæ, et versus dominum regem graviter puniantur.* By this branch the

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F.N.B. 41. a.
20 E. 3. ex-
com. 9. 23 E. 3.
97. 20 E. 4.
20. b.

hospitallers and templers are to yeeld damages to the party griev-
ed, and to be grievously fined to the king, if they draw any man
in plea before the conservator of their priviledges of any thing de-
terminable in the kings courts.

(4) *Ad instantiam hospit' templar' aut aliorū privilegiorū.*] Hereby it appeareth that their jurisdiction extendeth respectively,
not onely to the hospitallers and templers, but to persons privi-
leged, or within their priviledges, and for that cause the judge
was termed *conservator privilegiorum*.

Linwood de foro
compet. cap. 2.

(5) *Prohibet dominus rex conservatoribus, &c. ne de cetero, &c. concedant citationes priusquam exprimatur super qua re fieri debeat citatio.*] This branch is in affirmance of the common law, as before
in this chapter it hath appeared; and this agreeth with Linwood,
who taketh a citation *in foro ecclesiastico* to be, as the writ *in foro
seculari*, for so it is by him defined. *Breve idem importat quod præ-
ceptum vel citatio, et in eo continetur gravamen, super quo præcedit actio
ipsius agentis seu prosequentis.*

(6) *Et si aliter fecerint conservatores, &c.*] By this branch the
party grieved shall recover his damages also against the said judge,
if he graunt any citation, or hold any plea of or for any matter
determinable in the kings court, so as the party grieved shall have
double remedy, both against the hospitallers and templers, and
also against their judge, and the king to have a double fine in re-
spect of the wrong done to his crown, and dignity, and the unjust
vexation of his subjects.

(7) *Conservatores.*] For this word see hereafter cap. 47.

Also if the judge did graunt a generall citation without expres-
sing the cause, by colour whereof the party was troubled, he should
yeeld to the party damages, and be grievously fined to the king.

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(8) *Et quia huiusmodi privilegiati impetrant conservatores, sub-
prios, præsentatores, sacristas, religiosos, qui nihil habent.*] Before
this act there was another mischief or abuse, and that was, that
these hospitallers and templers, to defeat the remedy that was given
to the party grieved against the judge in the cases abovesaid by
the common law, did constitute subpriors, chaunters, sextens, and
other religious men, which had nothing to satisfie the party griev-
ed, nor the king (whereby it appeareth that the party grieved in
the cases abovesaid had remedy by the common law) were more
bold to offend against the kings crown and dignity then their su-
periors, &c. for this mischiefe, or rather abuse, remedy is here
provided.

(9) *Qui audaciores sunt.*] The wisdom of the common law was
ever, that men of ability and sufficient meanes to live should be
called to offices, and judiciall places for three causes:

1. First, for that they would feare to offend; for men that are
in place of judicature, and without meanes, are, as here it ap-
peareth, boldest to offend.

2. They to maintaine their countenances are pronest to bribe
and extort.

3. That if they offend, they may be able to satisfie the party
grieved, and the king his fine: which three causes doe appeare by
this branch.

(10) *Ad lædendum dignitatem regis.*] Here it appeareth that in-
croachement of jurisdiction by ecclesiasticall judges contrary to the
kings lawes is *crimen læsæ dignitatis regis*: which appeareth by
these

these words, and hereafter it is in this branch said, *in præjudicium domini regis et coronæ suæ.*

(11) *Quod si fecerint, pro facto ipsorum respondeant sui superiores, ac si de proprio facto suo convicti essent.*] Here is the remedy provided for the last mentioned mitchiefe or abuse, *viz.* that the superiors, that is, those that appoint such judges (as are not sufficient to satisfy the party grieved his damages, and the king his fine) shall out of their temporalties satisfy the same according to the rule of *respondeat superior.*

And by the common law, if the coroner be insufficient, the whole county, who made election and choyce of him, shall *tanquam elector et superior* answer for him, and so shall the officer answer for his deputy.

Hil. 14 E. 3. ex pte remem. regis in Scac' Rot. 9. Herlizans case. 39 H. 6. 32.

Fleta, li. 6. c. 36.
respondeat superior. 52 H. 3.
Stat. de Scac' W. 2. c. 2. & 11.
44 E. 3. 13.
41 Ass. 10.
50 E. 3. 5.
39 H. 6. 32.
2 H. 6. ca. 10.
l. 11. fo. 92.
The earle of Devonshires case.

C A P. XLIV.

DE custodibus bestiarum in itineribus, virgam portantibus (1) coram justic' de banco: ordinatum est, quod de qualibet assisa et jurata quam custodiunt, capiant decem denarios tantum, de chirographis nihil. De his qui recuperant demandas suas versus plures per defaultam, redditionem, vel alio modo per judicium sine assisa, vel jurat', nihil. De his qui recedunt sine die per defaultam petentis vel querentis, nihil capiant. Et si quis recuperaverit demandam suam versus plures (2) per unum breve, et per re-

[467] *cognitionem assise vel jurat' de quatuor denariis sint contenti. Et similiter si plures in uno brevi nominati per recognitionem assise vel jurate recuperaverint demandam, de quatuor denariis sint contenti. De his qui faciunt homagium in banco, de superiori panno sint contenti. De magnis assis, attinētis, juratis, et duello percusso xii.d. tantum capiant. De his qui vocati sunt coram justic' ad sequend', vel defendend' pacium suum, nihil capiant pro egressu vel ingressu. Al placita coronæ de qualibet duodena xii.d. tantum capiantur. De quolibet per snario deliberato iv.d. tantum capiantur. De quolibet cujus pax proclamata*

CONCERNING porters bearing verge before justices of the bench in the circuit; it is provided, that of every assise and jury that they keep they shall take x.d. only, and for the bills nothing. Of such as recover their demands by default, confession, or otherwise by judgement without assise and jury, they shall take nothing. Of such as go without day by default of the demandant or plaintiff, they shall take nothing. And if any recover his demand against many by one writ, and by recognizance of assise or jury, they shall be content with iv.d. And likewise if many named in one writ do recover by recognizance of assise or jury, they shall be content with iv.d. Of such as do homage in the bench, they shall be content with their upper garment. Of great assises, attaints, juries, and battle waged, they shall take xii.d. only. Of such as be called before justices to sue or to defend their pleas, they shall take nothing for their coming in or forth. At the pleas of the crown, for every dozen xii.d. only shall be taken. Of every prisoner delivered iv.d. shall be taken. Of every one whose peace is proclaimed

clamata fuerit xii. d. tantum capiatur. De inventoribus occisorum, et aliis attachiat' vill', iv. d. De decennariis hominibus, al', de quatuor hominibus et proposito ac decenariis nihil capiatur. De chirographariis pro chirographo faciendo statutum est, quod de quatuor solidis sint contenti (3). De clericis scribentibus brevia originalia et judicialia statutum est, quod pro uno brevi de uno denario sint contenti. Et injungit dominus rex omnibus et singulis justiciariis suis in fide et sacramento quibus ei tenentur (4), quod si hujusmodi ministri contra prædictum in aliquo articulo venerint, et querimonia ad eos perveneat, pœnam eis infligant rationabilem. Et si iterum deliquerint majorem pœnam eis infligant, qua castigari merito debeant. Et si tertio deliquerint, et super hoc convicti fuerint (5), si sint ministri de feodo (6), amittant feodum suum, et si alii sint, amittant curiam regis, nec rediant sine ipsius regis speciali præcepto aut gratia.

claimed xii. d. only shall be taken. Of the finders of men slain, and others of a town attached, iv. d. Of tythingmen nothing shall be taken. Of cyrographers, for making a cyrografe, it is ordained, that they shall be contented with iv. s. Of clerks writing writs original and judicial, it is ordained, that for one writ they shall take but i. d. And the king chargeth all his justices, upon their faith and oath that they owe him, that if such manner of officers offend in any article against this statute, and complaint come to them thereof, they shall execute on them reasonable punishment; and if they offend the second time, they shall award greater punishment, that they may be duly corrected: and if they offend the third time, and be thereupon convicted, if they be officers of the fee, they shall lose their fee; and if they be other, they shall void the king's court, and shall not be received again, without the special grace and licence of the king himself.

See W. 1. cap. 26, 27. 29. (2 H. 4. c. 8.)

(1) *De custodibus hostiorum in itineribus virgam portantibus, &c.]* This noble and wise king, knowing that extortion was a grievous burthen to his subjects, and having provided against the same by many laws, as before hath appeared: in this chapter he setteth down in particular, as an addition to his former acts, what fees the porters bearing vierge before the justices of the common pleas in their circuit, the chirographers, and clerks writing writs originall or judicial should take, which were the due fees before this act; but yet it was thought necessary that the same should be set down, and published by act of parliament for three causes.

1. That all the subjects of the realm might take notice, and know in what cases to give, and in what not.

2. In cases where they ought to give, what they were to give in certainty.

3. That the officers or ministers take no more then is here prescribed, under pretence of expedition, or other pretext whatsoever, nor to take any thing where nothing is due to them, under the pains hereby inflicted.

(2) *Et*

(2) *Et si quis reciteraverit demandam suam versus plures, &c.*] Where there were many tenants or defendants, 4. d. was before 26 Aff. 47. this act extorted for every tenant or defendant upon a recovery against them, where (they all being but as one tenant or defendant) there ought to be given but one 4. d. as it is declared by this act.

(3) *De chirographariis pro chirographo faciendo statutum est quod de 4. s. sint contenti.*] Chirographarius cometh of the Greek F.N.B. 147. a. word *χειρογραφειν*, which is as much to say, as a hand writing, so called, because he writeth the chirographs, that is, the indentures of the fine, one for the buyer, another for the seller: and the fine is said to be ingrossed, when the chirographer maketh the indentures, and delivers them.

By the statute of 2 Henry 4. cap. 8. it is provided, that the chirographer shall take but the said summe of 4. s. mentioned in this act for a fine levied. 2 H. 4. cap. 8.

(4) *Et injungit dominus rex omnibus, et singulis justiciariis suis in fide, et sacramento quibus ei tenentur, &c.*] By this great injunction, and commandment of so high a nature to the justices, the odiousness of extortion appeareth, and what an high offence it is, for that most commonly it is accompanied with perjury, and that it hath a consuming quality; whereof the prophet David speaking against the enemies of Almighty GOD, saith, Let the extortioner consume that he hath, and let the stranger spoil his labour.

(5) *Et si tertio deliquerint, et super hoc convicti fuerint.*] *Convicti fuerint* is here taken for *adjudicati fuerint*. See W. 2. cap. 4.

Though this branch saith, *et super hoc convicti fuer'*, and may seem to refer to the third offence, yet cannot he be convicted of the third before he be convicted of the second, nor of the second before he be convicted of the first; and the second offence must be committed after the first conviction, and the third after the second conviction, and severall judgements thereupon given: for so it is to be understood in other acts of parliament, where there be degrees of punishment inflicted, for the first, second, and third offence, &c. there must be severall convictions, that is to say, judgements given upon legall proceeding for every severall offence, for it appeareth to be no offence untill judgement by proceeding of law be given against him.

(6) *Si sint ministri de feodo.*] This is understood of officers that have any fixed estate, although it be not in fee-simple, as in the 42. chapter is shewed; for the largest estate of any of the ministeriall offices specified in this act that ever was granted, was for term of life; and this appeareth by the diversity of punishments imposed by this act; for if they have their offices *de feodo*, that is, of a fixed estate, for the third offence *amittant feudum*, that is, *officium suum*; and if they have no fixed estate, but at pleasure, *amittant curiam regis*, that is, be forjudged the kings court.

See before, cap. 2, the sense of these words, *de feodo*.

C A P. XLV.

QUIA de his quæ recordata sunt (1) coram cancellario domini regis, et ejus justic' qui recordum habent, et in eorum rotulis irrotulatur, non debet fieri processus placiti per summonit ones, attachiamenta (2), effonium (3), visus terræ, et alias solemnitates curiæ (4), sicut fieri consuevit de contractibus et conventionibus factis extra cur': observandum est de cætero, quod ea quæ inveniuntur i rotulat' coram his, qui recordum habent, vel in finibus (5) content', sive sint contractus, sive conventiones, sive obligationes, sive servitia, aut consuetudines, recognita, sive alia quæcunque irrotulata, quibus curia domini regis (sine juris et consuetudinis offensa) auctoritatem præstare potest, talem de cætero habeant vigor' quod non sit necesse in posterum de his placitare (6), sed cum venerit conquirens ad cur' domini regis, si recens sit cognitio, vel finis levat', viz. infra annum, statim habeat breve de executione (7) illius recognitionis factæ. Et si forte à majori tempore transacto facta fuerit illa recognitio, vel finis levatus, præcipiatur vicecom' quod scire faciat parti, de qua sit querimonia, quod sit ad certum diem coram justic', ostendens (si quid sciat dicere) quare hujusmodi irrotulat', vel in fine content' executionem habere debeant (8). Et si ad diem non venerit (9), vel forte venerit, et nihil sciat dicere, quare executio fieri non debeat, præcipiatur vicecom', quod rem irrotulatam, vel in fine content' exequi faciat. Eodem modo mandetur ordinario in suo casu (10), observetur nihilominus quod [W. 2. cap. 9.] supradict' est de medio, qui per recognition' aut judicium obligatus est ad acquietandum (11). [13 E. 1. Mercato-

BECAUSE that of such things as be recorded before the chancellor and the justices of the king that have record, and be inrolled in their rolls, process of plea ought not to be made by summons, attachments, effoin, view of land, and other solemnities of the court, as hath been used to be done of bargains and covenants made out of the court; from henceforth it is to be observed, that those things which are found inrolled before them that have record, or contained in fines, whether they be contracts, covenants, obligations, services, or customs knowledged, or other things whatsoever inrolled, wherein the king's court, without offence of the law and custom, may execute their authority, from henceforth they shall have such vigour, that hereafter it shall not need to plead for them. But when the plaintiff cometh to the king's court, if the recognisance or fine levied be fresh, that is to say, levied within the year, he shall forthwith have a writ of execution of the same recognisance made. And if the recognisance were made, or the fine levied of a further time passed, the sheriff shall be commanded, that he give knowledge to the party of whom it is complained, that he be afore the justices at a certain day, to shew if he have any thing to say why such matters inrolled or contained in the fine ought not to have execution. And if he do not come at the day, or peradventure do come, and can say nothing why execution ought not to be done, the sheriff shall be commanded to cause the thing inrolled or contained in the fine to be executed. In like manner, an ordinary shall be commanded in
his

his case, observing nevertheless as before is said of a mean, which by recognisance or judgement is bound to acquit.

(Fleta, 2. c. 13. p. 76. sect. 9. 1 Inst. 131. a. Bro. Debt, 10. Bro. Parl. 29. Fitz. Scire fac' 1, 2, 3. 8. 12, &c. Fitz. Execut. 18. 35 57. 96. 100. Cro. El. 164. 13 Ed. 1. stat. 1. c. 9.)

Some diversity of opinion hath been, whether there was a *scire fac'* at the common law before this act; and the doubt grew for want of distinguishing between personall actions, and reall actions; for true it is, that in personall actions, if the plaintife after judgement given, or recognisance knowledged, sued out no proceffe of execution within the yeer, he could have no *scire fac'*; but the plaintife or conusee was driven to his originall, which is to be intended upon the judgement or recognisance) as in actions of debt, writs of annuity, or other personall actions, wherein debts or damages were recovered, or upon recognisances.

But in reall actions, or upon a fine levied, though the demandant or conusee sued out no execution within the yeer after the judgement given, or fine * levied, the demandant or conusee of the fine after the yeer might have had a *scire fac'* for the land &c. because he could not have any new originall, either upon the judgement or fine, as he might have in the other cases. Now this act giveth a *scire facias* in personall actions in lieu of a new originall.

And in reall actions, two things are remedied by this act, that is, first, the tedious proceffe, which was at the common law, is hereby abridged; and secondly, the great delays used therein are ousted, as views of the land, and other solemnities used in reall actions.

And the distinction abovesaid appeareth (if it be well observed) in our books, and therefore the old rule is hereby verified, *Qui bene distinguit, bene docet*.

And thus much being spoken for the cause of the making of this act, let us now peruse the words.

(1) *Quia de hiis quæ recordata sunt.*] Regularly upon this act, a *scire fac'* cannot be granted but upon a record; but in many cases a *scire fac'* is granted, partly upon a record, and partly upon such a suggestion, without which no proceeding could be upon the record.

(2) *Non debet fieri processus placiti per summon', attachiamen', effon', visus terræ, et alias solemnitates curiæ.*] Here be four things particularly named to be ousted, viz. proceffe of summons, proceffe of attachment, effoins, view of the land, and then generall words, other solemnities of courts.

(3) *Effon'.*] The effoin of the tenant or defendant is not onely restrained by this act, but of the pree in aid, who is a stranger to the writ, is also restrained.

And the plaintife in the *scire fac'* shall not be effoined, although it is his own delay.

(4) *E: alias solemnitates curiæ.*] It hath been resolved, that a protection is within these words, and that it should not be allowed in a *scire facias*.

And divers authorities are against it.

Vide devant, ca. 18. Hil. 13 E. 2. f. 74. b. in libro meo. Adjudge. al common ley. 8 E. 3. 28, 29, 44. 21 E. 3. 55. 40 E. 3. 10. L. 3. 3. 12. Sir William Herberts case, lib. 6. fol. 88. Carnons case. 19 H. 6. 5. 20 H. 6. 20. F.N.B. 265. g. Regit. 298. 299. 1. Part of the Institutes, sect. 505, 506 690. 18 E. 3. 33. 34. Nota dictum Wibby. 21 E. 4. 19. b.

1 H. 5. 4.

* [470]

Regula.

2 E. 3. 7, 8. 46 E. 3. Scire fac. 1. 4. 16 E. 3. Bre. 651. 15 E. 3. Scire fac. 115. 19 R. 2. ibid. 154. 17 E. 3. 36. 21 E. 3. 1. 4. 16. 14 H. 7. 6. Hil. 13 E. 2. fo. 74. b. in libro meo le case del Mr. Hospital de T. 2 H. 7. 10 & 11. Hill. 13 E. 2. ubi supra. 10 E. 3. 30. 12 H. 6. 8. 21 E. 4. 19.

40 E. 3. 18. 47 E. 3. 3. 37 H. 6. 32 15 H. 7. 8.

Aid,

* 17 E. 3. 46.
18 E. 3. 32.
40 E. 3. 18.
37 H. 6. 32.

13 E. 3. Scire
fac. 118. W. 2.
cap. 5.

36 H. 6. 32.
21 E. 4. 23. b.

* 8 E. 3. 56. 15
E. 3. Age 43. 95.
10 R. 2. Fauxer
de recovery 47.
3 H. 6. 34. b.
7 H. 6. 39. 10 H.
6. 5. 7 H. 7. 13.
12 H. 8. 8.
† 1. Part of the
Institutes, § 505.

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For receipts see
Brañt. l. 5. f. 377.
21 E. 3. 22. b.
21 E. 3. ubi su-
pra.
10 E. 2. exec.
137. 16 E. 2.
ibid. 138. 16 E.
3. Scire fac' 4.
21 E. 3. exec'
Statham.
3 E. 3. 44. F.N.B.
266. c. 267. b.

* Aid, age, and receit shall be granted in a *scire facias*; for *solemnitates curiæ* are properly delays in respect of the solemn judicall proceedings of court, and these words extend not to the right of the party to have his age, or to be received, or to have aid of another.

(5) *In finibus.*] Upon a fine *sur grant et render* of an advowson, a *scire facias* shall be granted, for this is a judicall, and no originall writ, for *de advocat' non sunt nisi tria brevicia originalia*.

And though fines be here named, yet recoveries in reall actions are within the purview of this act.

(6) *Quod non sit necessè in posterum de hiis placitare.*] This branch is thus to be understood, that the tenant or defendant, though he be a stranger to the recovery, shall not plead against the recovery any thing that proveth it erroneous or voidable; but he may plead matter that proveth the recovery, void, as that it was had *coram non judice*, or the like.

* Neither shall he in a *scire fac'* plead any thing against the title or matter of the recovery, where he may have an action, and therein falsifie the same.

† But the tenant or defendant may plead divers matters after the judgement given, to barre the plaintife of execution, as out-lawry, or a release of actions, &c.

(7) *Si recens sit cognitio, vel finis levat infra annum, statim habeat breve de executione.*] It hath been ruled that these words have relation to the teste of the recognisance, and not to the day of payment, and therefore if a recognisance be knowledged to pay a summe a year and halfe after, a *scire facias* lieth, and no *fieri facias*.

But I take that rule to be against law, and that *recens cognitio* is as much as *recens solutio cognitionis*; for the words be *statim habeat breve de executione*, which he cannot have before the day of payment be past.

If a judgement be given in a writ of annuity, the plaintiffe shall have execution within the yeare after every day of payment by *fieri fac'*, or *elegit*, though it be many yeares after the judgement; and so if a man be bound by recognisance in C. l. to pay it yearly at five severall dayes 20l. now immediately after the first day of payment he may have an *elegit*, or *fieri facias* for the 20l. and so at the second day passed, &c. and yet in both these cases there is above a yeare after the judgement given or recognisance knowledged, therefore these words *recens sit cognitio* shall relate to the day of payment of the money, which is the effect of the recognisance, and not to the teste of the recognisance, which is but the assurance for payment of the money.

And this word *recens* importeth, when the party may sue for the same, which he cannot doe before the day of payment be past, but this is to be understood, when the severall dayes of payment are contained in the recognisance it selfe, for if there be a day of payment expressed in the recognisance, and a condition or defeasance there of the same limiting other dayes of payment, there, these words *recens sit cognitio*, &c. shall relate to the day of payment expressed in the recognisance, and not to the condition or defeasance, and if there be no day of payment in the recognisance, then these words *recens cognitio*, &c. doe relate to the teste of the recognisance.

And

And albeit the plaintiffe cannot have execution within the yeare, according to the letter of this statute, yet if he come within a yeare of the payment, it sufficeth.

If lands be granted and rendred by fine, and in the fine it be mentioned that W. holdeth the same for 26 yeares after the terme ended, he shall have a *scire facias* albeit he could have no writ of execution within the yeare; and so it is if a reversion expectant upon an estate for life be graunted by fine, and after tenant for life liveth many yeares and dieth, the conusee shall have a *scire facias*, and yet could he not have a writ of execution within the yeare.

If the demandant or plaintiffe taketh his proces of execution within the yeare, though it be not served within the yeare, yet if he continue the same, he may have proces of execution at any time after the yeare.

One that is not party to the record, recognisance, fine, or judgement, as the heire, executor, or administrator, though they be privy, and though it be within the yeare, shall have no writ of execution, but are to have a *scire facias* to enable themselves to the suit; and so likewise of the tenant or defendants part, for the alteration of person altereth the proces; otherwise it is in case of a statute staple, or merchant, &c. because the proces is given by other acts of parliament.

But if a judgement be given in the court of common pleas, and within the yeare the judgement is affirmed in a writ of error in the kings bench, the alteration of the court worketh no alteration of the proces, but he may have his writ of execution within the yeare, and not be driven to his *scire facias*, though it hath been otherwise holden, but now the common experience and later resolutions are to the contrary.

(8) *Et si forte á maiori tempore transacto facta fuerit illa recognitio, vel finis levatus, præcipiatur vic' quod scire faciat parti de qua fit querimon', &c. quare executionem habere non debeat.*] Upon these words, *scire faciat parti*, in a *scire fac'* upon a recognisance out of the common pleas, the conusee must name all the terre-tenants at his perill, but in other courts the writ is generall against all terre-tenants.

The point of the writ is *quare executionem habere non debet*, and therefore the tenant shall not vowch.

This statute is in the affirmative, and therefore it restraineth not the common law, but the party may waive the benefit of the *scire facias* given by this act, and take his originall action of debt by the common law.

The formes of *scire fac'* upon * recognisances, &c. and likewise upon † fines and recoveries appeare in our books.

And seeing the words of the *scire fac'* be, *quare executionem habere non debet*, the tenant or defendant may plead any thing in barre of execution, as hath been said before.

(9) *Et si ad diem non venerit.*] * The party must either be warned, or regularly two *nibils* returned, and then by default execution shall be granted, and how the warning is to be made, it appeareth in our books.

The course of the court of common pleas is, that upon a recovery the plaintiffe shall have execution upon one *nibil* returned.

8 E. 3. 44.

F.N.B. 267. d.
2 R. 3. 8.
14 H. 7. 16. b.

21 Aff. p. 14.
14 H. 7. 15.
15 H. 7. 5.
Lib. 5. fo. 88.
Garmons case.

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20 E. 3. Scir' fac' 121. 39 E.
3. 15. 46 E. 3.
29. b.
8 H. 6. 17.
21 E. 4. 19.

39 H. 6. 2.
* 27 H. 6. 2.
35 H. 6. 24.
30 H. 6. 5.
19 H. 6. 49.
44 E. 3. 11. 20 E.
3. Scir' fac' 121.
46 E. 3. 29.
10 H. 4. 2. 3.
† 30 E. 3. 25.
17 E. 3. 74. 76.
77. Sir William
Herberts case,
ubi supra.
* 18 E. 3. exec.
57. 33 H. 6. 42.
10 H. 6. 12. 2 H.
7. 5. 1. 5 E. 4. 1.
4 H. 7. 7. Li. 5.
fo. 32.
Petifers case.

(10) *Eodem modo mandetur ordinario in suo casu.*] This branch is to be thus intended, that if a *scire facias* be brought upon a recognizance, or upon a judgement in a writ of annuity, and the sheriffe return that the defendant is *clericus et beneficiatus nullum habens laicum feudum*, &c. the plaintiffe shall have a writ to the bishop of the same diocese to warne the defendant, and upon warning, or two *nibils* returned, and default made, or if he appeareth, and shew no matter, wherefore execution should not be graunted, then a writ shall be awarded to the bishop to levy execution *de bonis ecclesiasticis*.

Regist. judic'
fol. 22. 26.

W. 2. cap. 9.

(11) *Observatur nihilominus quod supradictū est de medio, qui per recognitionem aut judicium obligatus est ad acquietandū.*] This clause was added *in majorem rei cautelam*, that the provision before made at this parliament cap. 9. in case that in a writ of mesne, *postquam medius venerit in curiam et cognoverit, quod acquietare debet tenentem suum, vel adjudicetur ad acquietandum, si post hujusmodi cognitionem aut judicium querimonia perveniat, quod medius non acquietavit tenentem suum, tunc exeat breve de judicio, quod vic' distringat medium ad acquietandum tenentem*: whereupon fore-judger is given; now if the plaintiffe in the writ of mesne should onely take his *scire facias*, then no fore-judger should follow thereupon, therefore this clause was added, that the former generall words of this act, *five alia quæcumque irrotulata*, &c. should not take away the benefit of the former act concerning the fore-judger in a writ of mesne, but, as hath been said, this act being in the affirmative taketh not away neither the common law, nor the benefit of the former act concerning the said fore-judger; for the plaintiffe may take advantage either of the one or other, at his election; wherein it is to be observed that an act of parliament cannot be made too plaine: but note the fore-judger is given onely against him that made the acknowledgement, or against whom judgement was given, and not against his heire, and therefore this act is an addition declarative to the former, *viz.* that a *sci' fac'* may in those cases lie against the heire.

14 E. 3. mesne 9.
46 E. 3. 31. fee
W. 2. c. 9. more
of this matter.

[473]

C A P. XLVI.

CUM in statuto edito apud Merton, concessum fuerit, quod domini vassorum, boscorum, et pasturarum approbare se possint (1) *de vastis, boscis, et pasturis illis, non obstante contradictione tenentium suorum, dummodo tenentes ipsi haberent sufficientem pasturam ad tenementa sua, cum libero ingressu et egressu ad eadem. Et pro eo quod nulla fiebat mentio inter vicinum et vicinum, multi domini vassorum, boscorum, et pasturarum hucusque impediti extiterint per contradictionem vicinorum* (2) *sufficientem pasturam habentium.*

WHEREAS in a statute made at Merton, it was granted that lords of wastes, woods, and pastures, might approve the said wastes, woods, and pastures, notwithstanding the contradiction of their tenants, so that the tenants had sufficient pasture to their tenements with free egress and regress to the same: and forasmuch as no mention was made between neighbours and neighbours, many lords of wastes, woods, and pastures, have been hindered heretofore by the contradiction of neighbours having sufficient

bentium. Et quia forinseci tenentes non habent majus jus communicandi in bosco, vasto, aut pastur' alicujus domini, quam proprii tenentes ipsius domini: statutum est de cætero, quod statutum apud Merton provisum inter dominum et tenentes suos, locum habeat de cætero inter dominos vastorum, boscorum, et pasturarum et vicinos (3), ita quod domini hujusmodi vastorum, boscorum, et pastur' salva sufficienti pastura hominibus suis et vicinis, appruare sibi possint de residuo. Et hoc observetur de his qui clamant pastur' tanquam pertinentem ad tenementum suum. Sed si quis clamat communiam pastur' per speciale feoffamentum, vel concessionem ad certum numerum averiorum, vel alio modo (4), quam de jure communi habere deberet, cum conventio legi deroget, habeat suum recuperare, quale habere deberet per formam concessionis sibi factæ. Occasione molendini ventritici, berchariæ (5), vaccariæ (7), necessarij (8), augmentationis cur', aut curtilagii de cætero non gravetur quis per assisam (5) novæ disseisinæ de communia pastur'. Et cum contingat aliquando, quod aliquis jus habens appruare, fossatum aut sepem levaverit, et aliqui noctant, vel alio tali tempore quo non credunt factum eorum sciri, fossatum aut sepem prostraverint (9), nec sciri poterit per veredictum assise, aut jurata, qui fossatum aut sepem prostraverint, nec velint homines de villatis vicinis indicare (10) de hujusmodi facto culpabiles, distringantur propinqua villatæ circum adjacentes, levare fossatum aut sepem, ad cæstum proprium, et dam-

[474] *na restituere (11). Et cum aliquis jus non habens communicandi usurpet communiam (12) tempore quo hæredes infra ætatem extiterint, vel uxores sub potestate virorum suorum existentes, vel pastura sit in manu tenentium in dotem, per legem Angliæ, vel aliter ad terminum vitæ, vel annorum, vel per feodum talliatum, et pastura illa diu fuerint usi; multi*

sufficient pasture: and because foreign tenants have no more right to common in the wastes, woods, or pastures of any lord than the lord's own tenants; it is ordained, that the statute of Merton, provided between the lord and his tenants, from henceforth shall hold place between lords of wastes, woods, and pastures, and their neighbours, saving sufficient pasture to their tenants and neighbours, so that the lords of such wastes, woods, and pastures, may make approvement of the residue. And this shall be observed for such as claim pasture as appurtenant to their tenements. But if any do claim common by special feoffment or grant for a certain number of beasts, or otherwise which he ought to have of common right, whereas covenant barreth the law, he shall have such recovery as he ought to have had by form of the grant made unto him. By occasion of a windmill, sheepecote, deery, inlarging of a court necessary, or courtelage, from henceforth no man shall be grieved by assise of novel disseisin for common of pasture. And where sometime it chanceth, that one having right to approve, doth then levy a dyke or an hedge, and some by night, or at another season, when they suppose not to be espied, do overthrow the hedge or dyke, and it cannot be known by verdict of the assise or jury, who did overthrow the hedge or dyke, and men of the towns near will not indict such as be guilty of the fact. The towns near adjoyning shall be distrained to levy the hedge or dyke at their own cost, and to yield damages. And where one, having no right to common, usurpeth common what time an heir is within age, or a woman is covert, or whilst the pasture is in the hands of tenants in dower, by the courtesy, or otherwise for term of life, or years, or in fee-tail, and have long time used the pasture,

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may

sunt in opinione quod hujusmodi pasturæ debent dici pertinere ad liberum ten', et quod hujusmodi possessori competere debet actio per breve nov. disseis. si ab hujusmodi pastur' deforceantur: sed de cætero tenendum est, quod habentes hujusmodi ingressum à tempore quo currit breve mortis antecessoris (13), si antea communiam non habuerunt, non habeant recuperare per breve no. diff. si fuerint deforceati.

many hold opinion, that such pastures ought to be said to belong to the freehold, and that the possessor ought to have action by a writ of novel disseisin, if he be deforced of such pasture; but from henceforth this must be holden, that such as have entred within the time that an assise of mortdaunceffor hath lien, if they had no common before, shall have no recovery by a writ of novel disseisin, if they be deforced.

(1 Roll 365. 20 H. 3. c. 4. 11 Rep. 74. 4 Rep. 58. 13 H. 7. f. 13. Dyer, 47. 316. 339. Cro. Car. 281. 440. 580. Enforced by 3 & 4 Ed. 6. c. 3. 7 H. 4. f. 38. Skinner, 93. By 6 Geor. 1. c. 16. sect. 1. the remedy of the act is extended to the destroyers of trees, &c. by night or day, &c. 1 Lutw. 141. 156. 1 Geo. 1. stat. 2. c. 48.)

(1) *Cum in statuto edito apud Merton, concessum fuerit, quod domini vasorum, boscorum, et pasturarum appruare se possint, &c.]* Here is the statute of Merton recited, and because in that act no mention was made between neighbour and neighbour, the doubt was, whether that statute extended onely between lord and tenant, and therefore many lords of wastes, woods, and pastures have been letted to make approvement by the contradiction of neighbours, though they had sufficient pasture; for remedy whereof this statute was made.

6 H. 3. Common 26.

12 H. 3. ibid. 25.

(2) *Per contradictionem vicinorum.]* Note it is not said that the lord could not improve against a neighbour, but that the lords were letted by the contradiction of the neighbours; for by the common law the lord might improve against any that had common appendant, but not against a commoner by grant.

(3) *Statutum est de cætero, quod statutum apud Merton provisum inter dominos, et tenentes suos, locum habeat de cætero inter dominos vasorum, &c. et vicinos.]* This branch is from the making of this act an exposition of the statute of Merton, so as now the statute of Merton doth extend inter vicinum et vicinum; but though it be an act of exposition of a former act, yet this exposition shall take effect but de cætero, that is, from the making of this act of exposition. And the reason that this act had a retrospect to the statute of Merton was, quia forinseci tenentes non habent majus jus communicandi in bosco, vasto, aut pastura alicujus domini, quam proprii tenentes ipsius domini.

Brit. f. 144. 147.

18 Aff. Pl. 4.

18 E. 3. 43.

13 H. 7. 13.

32 H. 8. Dier

47. b. 14 Eliz.

Dier 13. 16.

Vicinus is properly qui una in eodem vico est, but here it is taken for a neighbour, though he dwell in another town, so the towns and commons be adjoining together; and if the lord hath common in the tenants ground, the tenant may improve within this act, for there the lord is in this case vicinus.

Ad assisas capi' apud Penreth in com' Cumbriae, coram Roberto de Hereford et sociis suis, &c. die Veneris in crast' inventionis sanctæ crucis, an. regis Ed. 1. 30. Which record we have seen. In an assise brought by John of Rowbery, and Isabel his wife, against Matild of Multon, and others, of 20 acres of pasture and wood in O. the case appeareth by the verdict of the recognitors of assise, viz.

Quod prædict' Matild, & similiter omnes antecess' sui domini de Gillefland à tempore quo Waren' de Gillefland devenit ad manus antec' suorum usi sunt hujusmodi libertate, quod nullus libere tenens infra baron' illam, se appruire possit de vasto suo, sine licentia, & voluntate præd' Matild, & antecess' suorum, nec aliquis temporibus retroactis in aliquo de vasto se appruavit nisi satisfecerit præd' Matild, seu antecess' suis; & quæsi si præd' Matild habeat communiam in ten' de quo, &c. dicunt quod sic ratione manerii sui de Cuquentyngten, quod quidem maner' distat à ten' circit' per unam leuam; quæsi si præd' Matild habeat sufficientem communiam extra ten' præd' cum libero ingressu & egressu, dicunt quod sic; dies datus est eis de audio judo' suo apud Westm', a die Sancti Michaelis in xv. dies, &c. Postea à die Sancti Hilar' in xv. dies, anno regni domini regis nunc vicesimo venerunt præd' Walterus, & Ihab' per attorney ipsius Ihab', & similiter præd' Matild per balivum suum, et petunt recordum, &c. Et quia conjunctum est per assisam istam, quod à tempore quo Waren' præd' devenit in seissina præd' Matild, ipsi antec' & similiter ipsa Matild tali libertate usi sunt, quod nullus libere tenens infra baroniam illam, se possit appruiri de vasto suo sine licentia, & voluntate præd' Matild, & antecess' suorum, nec aliquis temporibus retroactis in aliquo de vasto se appruavit nisi prius satisfecerit præd' Matild, seu suis antecessoribus. Et ten' quod nec provisio de Merton', nec statut' domini regis nunc de appruamenti' fact', seu faciend' &c. non operat' in casu proposito, cum illud de Merton' habeat locum inter dominum appruanti', et tenentem communiam clamantem. Et statutum regis nunc inter vicinum appruantem, et vicinum communiam clamantem, et hoc de communia pertinet ad liberum ten', et casus propositus est inter dominam comm' clamantem, et tenent' appruantem, et hoc de communia non pertinet ad ten', imo usitata in baron' præd' per præd' Matild, & antecessores suos ratione domini sui in eadem baronia, à tempore præd'. Consuetudo est quod præd' Matild, & alii inde sine die. Et quod præd' Walterus, & Ihab' nihil capiant per assisam, set sint in misericordia pro falso clamor', &c.

Note this prescription.
Vide 3 E. 3. 3.
8 E. 3. 37.
46 E. 3. 13. 23.
Similia.

* Nota hoc.

This judgement, being given in the same kings time that the said statute of W. 2. was made, both in respect of the said prescription, together with the common reserved at the time of the creation of the tenancy, as by the record it appeareth, standeth well with the books of 18 E. 3. and 18 Ass. for there was no such prescription; and there it is holden, that if the lord had the common by reservation at the time of the first feoffment, then no approvement could be made by his tenant against him: and note the quality of the common mentioned in the judgement.

(4) *Et hoc observetur de hiis qui clamant pasturam tanquam pertinentem ad tenementum suum. Sed si quis clamat communiam pasturæ per speciale feoffamentum, vel concessorem ad certum numerum averiorum, vel alio modo, &c.]* So here it is to be observed, that neither this statute, nor the statute of Merton doth extend to any common, but to common appendant, or appurtenant to his tenement, and not to a common in gross to a certain number.

(5) *Occasione molendini ventriticæ, bercariæ, vaccariæ, necessarij, augmentatiouis curiæ, aut curtilagij de cetero non gravatur quis per assisam, &c.]* Here be five kinds of improvements expressed, that both between lord and tenant, and neighbour and neighbour, may be done without leaving sufficient common to them that have it (any thing either herein, or in the statute of Merton to the contrary notwithstanding) and these five are put but for examples; for the

12 H. 3. ubi supra. 3 E. 2. Common 21.
See the Exposition upon the stat. of Merton.

[476]

7 H. 4. 38.

lord may erect a house for the dwelling of a beast-keeper for the safe custody of the beasts aswell of the lord, as of the commoners depasturing there in that soil; and yet it is not within the letter of this law.

Domesday, tit.
Sudsex Piccam,
&c.

(6) *Bercariæ.*] *Bercaria* signifieth a sheep-house, and is derived from the French word *bergerie*, which also signifieth a sheep-house; and by turning *g* into *c*, the legall word is made *bercaria*, and so it is taken in this act: in Domesday it is called *berquarium*; it signifieth also a tanne-house, derived of the Saxon word *berc*. For this, see the first part of the Institutes, sect. 1. *verbo bercaria*.

(7) *Vaccariæ.*] *Vaccaria* is derived à *vacca*, and signifieth *stabulum vaccarum*, a cow-house, as *vaccheria* doth in Italian.

Fleta betweene *bercariæ* and *vaccariæ*, hath *dayerye*; this word I finde not in the printed books, but in ancient manuscripts, and it signifieth a dayery or milk-house; in Latine, *lactarium*.

32 Aff. 5.

(8) *Necessarii.*] Is to be applyed to *curtilagii*, both in congruity and by our books, and necessary shall not be taken according to the quantity of the free-hold he hath there, but according to his person, estate or degree, and for his necessary dwelling and abode; for if he hath no free-hold there in that town, but his house onely, yet may he make a necessary enlargement of his curtilage.

(9) *Et cum contingat aliquando, quod aliquis jus habens appruare, fossatum aut sepem leuaverit, et aliqui necitanter, vel alio tali tempore quo non credant factum eorum sciri, fossatum aut sepem prostraverint, &c.*] Forasmuch as the lord, (as hath been said in the exposition upon the statute of Merton) ought to divide the parts improved, by the hedge, ditch, or other defence: now this branch provideth, that if persons unknown, either in the night or otherwise, so secretly prostrate the ditches, hedges, or other fences, as the lord cannot know against whom to bring his assise or other action; and the men of the towns next adjoyning thereunto round about do not indict the misdoers of the fact, those next towns round about shall be distrained to make the hedge or ditch at their own cost, and yeeld damages to the lord; *sed certè opus est interprete*.

See the first part
of the Institutes,
sect. 69.

(10) *Indictare.*] That is, to indict them at the kings suit, either of a ryot, force, or trespass: but here it is demanded, what time have the next towns round about adjoyning to indict the misdoers, seeing here is no time appointed? and the answer is, that seeing no time is appointed, the law doth appoint (as in many cases it doth) a yeer and a day for the indicting of the misdoers; and by the indictment, the lord shall know against whom to bring his action.

(11) *Distringantur propinquæ villatæ circum adjacentes leuare fossatū aut sepem, ad costū propriū, et damna restituere.*] For, *vicini vicinorum facta præsumuntur scire*: if the bordering towns do not within a yeer and a day indict the misdoers, then shall the lord or other party grieved bring his action upon this branch against the towns bordering round about the town wherein the fact was done, and judgement shall be given, that they shall at their proper costs make the ditch or hedge, &c. and yeeld damages; and after judgement given, they shall be distrained to make the hedge or ditch, &c.

apd

and so it was holden in the star-chamber, Hilar. 14 Jac. in Sir William Mallories case.

H. 14 Jac. in Camera itellata.

At the parliament holden the eight day of October in 13 E. 1. at Winchester, remedy it given to the party robbed, upon hue and cry, (if the men of the hundred where the robbery was done, take not the offender) against the men of that hundred: and there is special provision made, that the country shall have no longer space then forty dayes, &c. which prevented the time limited by the law.

13 E. 1. Stat. de Winchester.
Lib. 7. fo. 6, 7.
Milborns case.
27 Eliz. cap. 13.
3 E. 3. Coron.
299. Simile.

(12) *Et cum aliquis jus non habens communicandi usurpet communiam, &c.*] This branch is in affirmance of the common law, for no man can have either common appendant or in grosse by prescription, but by usage time out of minde, which is well expounded by Littleton, section 170.

1. Part of the Institutes, § 170.

And here is to be observed, that usurpations of commons in the times of infants, feme covert, tenant in dower, tenant by the courtsey, or otherwise for life or years, or tenant in tail, shall not binde, though there be long possession.

(13) *A tempore brevis mortis antecessoris.*] That is, a coronatione regis H. 3. which was in the first year of his reign, and between the coronation of H. 3. and this act, there was about 69 years, but yet that possession by that time, as here it appeareth, maketh no title in law to the common, if the commencement thereof can be shewed since the time of the reign of R. 1. but the said long possession is great evidence, and a strong presumption of the right of the common, and *stabitur presumptioni, donec probetur in contrarium.*

C A P. XLVII.

PROVISUM est, quod aquæ de Humber, Ouse, Trent, Dove, Arre, Derewent, Wharff, Nidd, Yre, Swale, Tese, Tyne, Eden, et omnes aliæ aquæ in regno in quibus salmones capiuntur, psonantur in defenso (1), quo ad salmones capiendos, à die nativitatis beatæ Mariæ (2), usque ad diem Sancti Martini (3). Et similiter quod salmunculi (4) non capiuntur, nec destruantur per retia, nec per alia ingenia ad stagna milendinorum, a medio Aprilis usque ad nativitatem sancti Johannis Baptistæ (5). Et in partibus ubi hujusmodi ripariæ fuerint (6), assignentur conservatores (8) istius statuti (7), qui ad hoc jurati (10) sæpius videant et inquirant (9) de hujusmodi transgressione, et in prima transgr^o puniantur per combustionem retium (11), et ingeniorum suorum. Et

IT is provided, that the waters of Humber, Ouse, Trent, Dove, Arre, Derewent, Wharfe, Nid, Yore, Swale, Tese, Tine, Eden, and all other waters (wherein salmons be taken) shall be in defence for taking salmons from the nativity of our lady unto St. Martin's day; and that likewise young salmons shall not be taken nor destroyed by nets, nor by other engines at milpools, from the midst of April unto the nativity of St. John Baptist. And in places whereas fresh waters be, there shall be assigned overseers of this statute, which being sworn, shall oftentimes see and inquire of the offenders; and for the first trespass, they shall be punished by burning of their nets and engines; and for the second time, they shall

si iterato deliquerint, puniantur per prisonam quarterii anni. Et si tertio deliquerint, puniantur per prisonam unius anni. Et sic multiplicata transgressione, crescat pœnæ inflictiō (12).

have imprisonment for a quarter of a year; and for the third trespass, they shall be imprisoned a whole year; and as their trespasss increaseth, so shall the punishment.

(13 R. 2. stat. 1. c. 19. 17 R. 2. c. 9. 22 Ed. 4. c. 2. 23 H. 3. c. 18. 25 H. 3. c. 7. 1 El. c. 17. 3 Jac. 1. c. 12. 30 Car. 2. stat. 1. c. 9. 4 & 5 W. & M. c. 23. 4 Ann. c. 21. 9 Ann. c. 26. 1 Geo. 1. stat. 2. c. 18.)

Before the making of this act, fishermen for a little lucre did very much harm, and destroy the increase of salmon by fishing for them in unseasonable times, which were between the beginning of September, and about the midst of November; and likewise for young salmon, or salmon peals, between the midst of April, and towards the end of June: against both which, provision is made by this act.

17 R. 2. cap. 9.
W. 2. c. 41. li. 2.
46. the B. of
Cant. case.

Herein the Thames, *Thamesis nobile illud flumen* is not named, and it was holden, that the generall words extended not to inferior rivers, and therefore the Thames is added by another act in the first place.

(1) *Ponantur in defensione.*] That is, that by this act it is prohibited that salmon, or yong salmon shall be taken between the times mentioned in this act.

(2) *A die natiuitatis beatæ Mariæ.*] Which is on the eight day of September.

(3) *Usque ad diem Sancti Martini.*] Which is the eleventh day of November.

And note, that the day of Saint Martin, and the feast of Saint Martin is all one, and the feast in legall understanding beginneth and endeth with the day.

13 R. 2. ca. 19.
17 R. 2. ca. 9.

(4) *Salmunculi.*] That is, yong salmon, or salmon peals, or salmon smelts; for so this act is expounded by another statute: they are also called salmon sews, or salmon issues.

(5) *Usque natiuitatem Sancti Johannis Baptiste.*] This is not taken literally for the nativity of Saint John Baptist, for that is long since past; but it is taken according to the intention of the makers, untill the day or feast of his nativity.

And such construction shall be made of covenants, or bonds to pay money, or doe any act; for example, at the annunciation of our lady, it shall be taken for the feast of the annunciation, as here the nativity, &c. is taken for the day of the nativity.

(6) *Ubi ripariæ fuerint.*] *Ripariæ* is a word derived from *ripa*, and here it signifieth the water, or river running between the banks, be it fresh or salt; and thereupon *riparius* is taken for a fisherman.

(7) *Assignentur conservatores istius statuti.*] And this assignation must be by commission under the great seal, and such a commission could not have been made without warrant by authority of parliament; for legall commissions have their due forms, as well as originall writs, and none can be newly framed without act of parliament, how necessary soever they seem to be: as in this case it was necessary that such a commission should be granted for preservation of salmon and of their yong, and for avoiding of the destruction of the.

Regist. 123. 125.
64. 138. 88. &c.
F.N.B. 117,
111, 112, 113.
18 E. 3. ca. 1. 4.
Stat. 1. Rot.
Parliam. 5 H. 4.
nu. 36. 2 H. 4.
Rot. Parl. nu.
22. Dier 1 El.
S. Rogers case.

the same, being victuall of great and precious account; and what is more necessary then increafe of victuall? yet could it not be newly raised without act of parliament; but commissions of new inquiries, &c. and of new invention, have been condemned by authority of parliament, and by the common law.

(8) *Conſervatores.*] See this word before, cap. 43.

(9) *Qui ad hoc jurati ſæpius videant, et inquirent.*] Execution of the law is the life of the law, and therefore here is provision made for the continuall, due, and speedy execution of the law.

(10) *Jurati.*] A new oath cannot be imposed upon any judge, commissioner, or any other subject without authority of parliament, as here it was; but the giving of every oath must be warranted by act of parliament, or by the common law time out of minde.

The oath of the counsellors, judges, sheriffes, under-sherifes, escheators, attorneys, maiors, and bailifes are established by act of parliament.

(11) *Et in prima transgreſſione puni tur, per combustionem retium.*] This ought to be by indictment at the suit of the king, and the punishment cannot be indicted upon the delinquent before upon due conviction, *ſecundum legem et conſuetudinem Angliæ*, judgement be given.

And, as hath been said in the like case, he cannot be punished for the second offence, before he be adjudged for the first, and that second offence must be committed after the judgement given for the first; nor for the third, before he be adjudged for the second, and that third must be committed after the judgement for the second; for *quod non apparet non eſt, et non apparet judicialiter in iſto caſu ante iudicium*.

(12) *Multiplicata transgreſſione, creſcat pœnæ inſiſtitio.*] This is a maxime of the law, agreeing with those other,

Ex frequenti delicto augetur pœna:

Creſcente malitia creſcere debet & pœna.

Stat. de 20 E. 3.

4 H. 4. c. 18.

2 H. 5. c. 6.

17 E. 4. c. 2.

1 R. 3. c. 6. 5 R.

2. c. 13. 32 H. 8.

ca. 46. 21 H. 8.

c. 16. 1 Eliz. c. 1.

28 Eliz. ca. 1.

43 Eliz. ca. 12.

Stat. de 20 E. 3.

ubi ſupra.

See W. 1. ca. 44.

Regula.

Regula.

C A P. XLVIII.

DE viſu terræ ordinatum eſt et ſtatutum, quod de cætero non concedatur viſus, niſi in caſu quando viſus eſt neceſſarius (1): ſicut ſi aliquis amittat tenementum per default: et ille qui amiſit ſuſcitet aliud breve ad petendum idem tenementum (3). Et in caſu quando aliquis per exceptionem dilatoriam (2) caſſat breve poſt viſum terræ (4), ſicut per non tenuram, vel male nominando villam, vel huiusmodi (5), ſi ſuſcitet aliud breve, in hoc caſu et in ſuperiori (6) de cætero non concedatur viſus, dum nudo viſum habuerit in

FOR view of land it is ordained and provided, that from henceforth view ſhall not be granted but in caſe when view of land is neceſſary: as if one loſe land by default, and he that loſeth, moveth a writ to demand the ſame land. And in caſe when one by an exception dilatory abateth a writ after the view of the land, as by non-tenure, or miſnaming of the town, or ſuch like, if he purchaſe another writ, in this caſe, and in the caſe before mentioned, from henceforth the view ſhall not be granted,

in prioribus brevibus. In brevi de dote cum petatur dos de tenemento, quod vir uxoris alienavit tenenti aut ejus antecessori (7), cum ignorare non debeat tenens, quale ten' vir uxoris alienavit (8) sibi, vel antecessori suo licet vir non obiit seifitus, nihilominus tenenti de cetero non erit visus concedendus. In brevi etiam de ingressu cassato per hoc (9) quod petens nominavit male ingressum, si petens suscitet aliud breve de alio ingressu, si tenens in priori brevi visum habuerit, in secundo non habebit. In omnibus etiam brevibus per que ten' petunt (11) ratione dimissionis (14), quam petens vel ejus antecessor fecit tenenti, et non ejus antecessori, sicut quod ei dimisit, dum fuit infra etatem, non compos mentis (10), in prisona (13), et consimilibus (12), non jaceat de cetero visus, sed si dimissio facta fuerit antecessori jaceat visus sicut prius.*

granted, if he had view in the first writs. In a writ of dower, where the dower in demand is of land that the husband aliened to the tenant or his ancestors, where the tenant ought not to be ignorant what land the husband did aliene to him or his ancestor, though the husband died not seifed, yet from henceforth view shall not be granted to the tenant. In a writ of entre also, that is abated because the demandant misnamed the entre, if the demandant purchase another writ of entre, if the tenant had view in the first writ, he shall not have it in the second. In all writs also where lands be demanded by reason of a lease made by the demandant, or his ancestor, unto the tenant, and not to his ancestor, as that which he leased to him, being within age, not whole of mind, being in prison, and such like, view shall not be granted hereafter; but if the demise were made to his ancestor, the view shall lie as it hath done before.

Glanv. li. 2. ca. 1. (Fitz. View. 50, 51. 57. 129. 118. Fitz. View. 1, 2. 5. 24. 41. 49. 69. 102, 118, 119. 10 H. 7. f. 8.)

(1) *De visu terre ordinatum est et statut', quod de cetero non concedatur visus, nisi in casu quando visus est necessarius.*] There be divers books in law, wherein this maxime is cited.

(2) *Per exceptionem dilatoriam.*] The writ must be abated by exception, and therefore if the demandant be nonsuit, the tenant shall have the view again.

If the writ doth abate by consens of the demandant, and not by the plea and exception of the defendant, the tenant shall have the view in the new writ.

If the tenant hath the view, and the demandant discontinue his suit, in a new action the tenant shall have the view.

(3) *Sicut si aliquis amittat tenementum per defaultam: et ille qui amisit suscitet aliud breve ad petendum idem ten'.*] This branch is not to be understood according to the letter, for if one lose by default in an assise, and the tenant bring a writ of right of the same lands against the recoveror, he shall have the view; but this branch is to be understood of a *quod ei de forceat* upon the recovery by default, which writ is grounded upon the former record, so as the tenant hath sufficient notice thereby; and therefore neither party privie nor estranger shall have view in this writ: but otherwise it is in the former case of the writ of right, for that is not grounded upon the record.

(4) *Et*

8 E. 3. 55. 38 E.

3. 1. 39 E. 3. 38.

& 18. 46 E. 3.

16, 17. 21 H. 6.

42. 3 E. 3. View

135. 12 E. 3.

ibid. 79. 13 E. 3.

ibid. 81. 24 E. 3.

ibid. 95. 22 E. 3.

9. 29 E. 3. 46.

21 H. 6. 42.

7 E. 3. 36.

41 E. 3. 8. 30.

44 E. 3. 43.

46 E. 3. 34.

50 E. 3. 25.

(4) *Et in casu quando aliquis per exceptionem dilatoriam cassat breve post visum terræ.*] Here be two examples set down of dilatorie pleas in particular, that is to say, non-tenure, and misnaming of the town where the lands do lye, both which exceptions do rise upon the view.

A præcipe is brought against a feme, who abateth the writ for misnaming of the town, the wife taketh husband, in a new writ against husband and wife they shall have the view; for albeit it be the act of the wife to take husband, yet for that the husband was not party to the first writ, they shall have the view in the second.

(5) *Vel bujusmodi.*] These generall words, or the like, are thus to be expounded, that the writ must abate for such a plea dilatory, as doth rise upon the view, as the two particular examples of non-tenure, and misnaming of the towne doe; but when the writ abate for some dilatories which rise not upon the view, then in a new writ the view shall be graunted; as where the writ is abated for joyntency, and the new writ is brought against them both they shall have the view, because in the new writ another person is joynted; and so it is if any more or lesse land be contained in the new writ: but if the first writ after the view abated for default of forme, or for false Latin, or by taking of husband, in a new writ the tenant shall have the view againe, for these cases are not within this word *bujusmodi*; for they rise not upon the view, as the two examples herein expressed doe.

And besides the first was no sufficient writ, and an insufficient writ and no writ is all one; so it is if one of the tenants after the view dieth, in a new writ the surviving tenant shall have the view againe, albeit the feme came in as a feme sole by receipt, and the husband died, for this did not rise upon the view, but by the act of God.

But if the first writ were brought in K. and the tenant plead that part of the lands extend in L. in a new writ for the lands in K. and L. though a new town be added, yet because the new town was added by force of the plea of the tenant himselfe, he was ousted of the view.

It is not required by this act that the second writ should be brought freshly by Journers accounts, though it be so pleaded in many books.

(6) *In hoc casu et in superiori.*] This branch extendeth not to the clause of the recovery by default, for in the *quod ei deforceat*, the writ being grounded directly upon the former record, wherein the tenant in the *quod ei deforceat* recovered in the former writ, he hath sufficient notice thereof, and therefore, as hath been said, shall not have the view.

And therefore these words [*in hoc casu*] are to be referred to the last generall words, *viz.* [*vel bujusmodi*] and these words [*et in superiori*] are to be referred to the two examples dilatory of non-tenure, and misnaming of the towne.

(7) *In brevi de dote cum petatur dos de tenemento quod vir uxoris alienavit tenenti aut ejus antecessori, &c.*] This branch extendeth not to a writ of dower, *unde nihil habet*, for therein no view did lie at the common law, but extendeth to other writs of dower, whether for dower at the common law, or *ex assensu patris, ad hospitium ecclesie*, &c. or by custome.

30 E. 3. 3.

[481]

See Circum-
specte agatis,
simile. W. 2. c. 5.
simile. Lib. 11.
fo. 35. the Pool-
ters case.

8 E. 3. 55. 18 E.

3. 31. 21 H. 6.

42. 6 E. 3. 15.

17 E. 3. 39. 40.

18 E. 3. 41. 38 E.

3. 1. 19 E. 3.

view 111. 33 E.

3. ib. 184. 30 E.

3. 8. 21 H. 6. 42.

34 H. 6. 10. 42.

E. 3. 23. 43 E. 3.

35. 29 E. 3. 17.

45. 38 E. 3. 1.

39 E. 3. 27. 6 E.

2. view 163. 5 R.

2. ibid. 63. 20 E.

2. ibid. 112.

26 H. 6. ibid. 14.

21 H. 6. 42.

21 H. 6. 55.

2 H. 6. 14.

17 E. 3. 41. b.

22 E. 3. 9.

41 E. 3. 8. 39.

44 E. 3. 43.

50 E. 3. 25.

45 E. 3. 37.

Temps E. 1.

view 172.

20 E. 3. ib. 113.

22 E. 3. 9. 3 E.
3. 16. 8 E. 3. 55.
2 H. 4. 20.
5 H. 5. 4.
34 H. 6. 3.
35 H. 6. 59.
Bract. 1. 5. f. 377.
18 E. 3. 55.

At the common law if the husband died seised of the land of estate of inheritance, whereof dower is demanded, the heire or any claiming under him should not have the view, because it was presumed that the heire was contentant what lands his auncestor had at the time of his death, and herewith agreeth Bracton who wrote before this statute; *Item denegatur visus in placito dotis de terra et tenemento de quibus vir mulieris nuper obiit seistus, quia habet tenens quod tantundem valet.*

But where the husband aliened, there at the common law view was granted, which was a delay to the demandant in dower (whose life did spend) and is taken away by this act.

30 E. 3. fo. 8.

If the baron demise to a feme and dieth, the feme taketh husband, in dower against them they shall have the view; for the alienation was not made to the husband, but to the wife; and the act saith *tenenti*.

2 H. 4. 1. 7 H. 4.
18. 5 E. 3. 6.
18 E. 3. 55. 30
E. 3. 3. 26 E. 3.
59.

(8) *Alienavit.*] If the tenant disseised the husband of the demandant in a writ of dower, he shall have the view, for this is no alienation, and therefore remain at the common law.

The best pleading to counterplead the view in case of alienation is, that the tenant entred by her husband, though the word of the act is aliened.

2 E. 4. 17.
9 E. 4. 6.

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44 E. 3. 31. 18 E.
3. 55. 14 H. 4.
32. 3 H. 4. 18.
19 E. 2. view 76.
13 E. 3. ib. 103,
104. 14 E. 3.
ibid. 93. 19 E.
3. ibid. 106.

In dower of a rent the tenant shall not have the view of the land, if the husband died seised of the rent, nor the tenant of the land have view thereof, if he had the rent by the release of her husband.

Tenant in dower of two acres, the demandant to counterplead the view said, that the tenant entred by her husband, the jury found; that she entred into one acre by her husband, and into the other acre by another, the demandant recovered her dower in the one acre, and the tenant had the view for the other.

20 E. 2. view
166. 29 E. 3. 32.
2 E. 2. view 137.

(9) *In brevi etiam de ingressu cassato per hoc, &c.*] A *cui in vita* is taken within this branch, and so is a *sur cui in vita*.

48 E. 3. 31.
46 E. 3. 34.
35 H. 6. 59.

(10) *In omnibus brevibus per quæ tenementa petuntur ratione dimissionis, quam petens vel antecessor fecerit tenenti et non ejus antecessori, sicut quod ei dimisit dum fuit infra ætatem, dum non fuit compos mentis, &c.*] This branch speaketh particularly of three examples, *viz.* of the *dum fuit infra ætatem, et non compos mentis*, and *in prisona*, and generally *in consimilibus*.

29 E. 3. 30.
view 155.

This branch extends not to these writs brought in the *per et cui;* for that is a degree further then this branch provideth for.

46 E. 3. 29.

(11) *Per quæ tenementa petuntur.*] Yet if any of these writs be brought of a rent, if the tenant demand the view of the land, though it be of another thing, then is demanded, the tenant shall be ousted of the view.

Circumspecte
agatis, simile.
Temps E. 1.
view 171. 6 E. 2.
ibid. 152.
36 H. 6. view 30.

(12) *Et consimilibus.*] By these words the predecessor of a bishop, or the like is taken where this branch speaketh *de antecessore* and *not de predecessore*.

It is to be observed that the two examples here put are of a *dum fuit infra ætatem*, and *non compos mentis*, and when the heire brings either of these writs of the demise of his auncestor from whom he claims the land as heire [*et consimilibus*] shall be intended of writs of like nature; and therefore if a *sur cui in vita* be brought supposing that the tenant had not entred but by one D. late husband of E. mother to the demandant, whose heire he is, the tenant shall

shall have the view, for he claimeth not as heire to him that made the demise, and therefore it is not *actio confimilis*.

(13) *In prisona.*] At this time, *viz.* in 13 E. 1. as hereby it appeareth there lay a writ of an alienation made by duress, *dum fuit in prisona*, and the writ of *dum fuit infra ætatem*, and this writ of *dum fuit in prisona* did lie for the party himselfe that made the alienation, but so doth not the other writ of *non compos mentis*, for that lieth not for the party himselfe, but for his heire.

In prisona; every restraint of the liberty of a freeman is an imprisonment, although he be not within the wals of any common prison.

If a man be imprisoned by order of law, the plaintiffe may take a feoffment of him or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment, for this is not by duress of imprisonment, because he was in prison by course of law; for it is not accounted in law duress of imprisonment, but where either the imprisonment or the duress that is offered in the prison, or at large is torcious and unlawfull, for *executio juris non habet injuriam*.

But now albeit the writ mentioned in this act is antiquated and gone in *desuetudinem*, yet may good use be made of this part of this branch, *dum fuit in prisona*, such excellent learning may be drawn out of these auncient fountains.

It may be gathered upon this act that the feoffment made by one by duress of imprisonment is not void, but voidable; for if it were void, then no præcipe could have been maintained upon a void alienation, and this branch saith, *in omnibus brevibus in quibus tenementa petuntur ratione dimissionis, &c. dum fuit in prisona*. And so it is in the case of the infant, with whom he is paralleled in this branch, and whose cases are very like in many respects: for as in the case of an infant, if he seal and deliver a deed, he cannot plead *non est factum*, but must avoid it by plea of infancie; so it is in the case of a bond made by duress of imprisonment: and as it is in the case of the infant, that a feoffment by livery of seisin made by his own hand is voidable by entry, or action and not void; so it is in the case of a feoffment made by one by duress of imprisonment, and livery made by his own hand, as by this branch it appeareth: and as in the case of an infant, a feoffment made by letter of attorney is void, and the feoffee is a disseisor; so it is in the case of a man that maketh it in the same manner by duress of imprisonment.

And as none shall avoid the feoffment of the infant when livery is made by his own hand, but onely he himself or his heirs, which are privies in blood inheritable, and neither privies in law, nor privies in estate: so it is in case of a feoffment made in like manner by duress of imprisonment, it is onely voidable by privies in blood inheritable, and not by privies in law or estate.

And by these resemblances and diversities this act is understood, and our books that seem *prima facie* are well reconciled: the duress *per minas, aut causa metus*, belongeth not properly to be treated of here; for this branch speaketh onely *dum fuit in prisona*; onely for affinity sake it is to be known, that a man shall avoid his deed for manuas of imprisonment, albeit he were never imprisoned: for a man shall avoid his own act for manuas in four cases, *viz.* 1. for fear of losse of life, 2. of losse of member, 3. of mayhem, and 4. of imprisonment;

Bract. l. 2. fo. 16. b. Brit. f. 19. Flet. li. 2. ca. 54. l. 3. ca. 7. l. 6. ca. 6. 7. & 14. First part of the Inst. § 437, 438.

First part of the Inst. sect. 406.

15 H. 3. duress
15. 2 E. 2. ibid.
18. 8 E. 3. 57.
8 Aff. 25.
43 E. 3. 6. 10.
6 R. 2. duress 12.
11 H. 4. 6. 4 E. 4.
17. 12 E. 4. 7.

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L'ib. 5. fo. 119.
Whelpdales case.
1 H. 7. 15.

Lib. 8. fo. 42,
43, &c. Whittingams case.
14 Aff. p. 20.
39 E. 3. 28.
41 E. 3. 9. Feoffment & Feits 40.
9 H. 6. 6. 35 H.
6. 27. 2 E. 4. 21.
Whittingams case, ubi supra.

39 E. 3. 28.
11 R. 2. Duress
21. 35 H. 6. 17.
38 H. 6. 21. 27.
39 H. 6. 5.
7 E. 4. 21.

imprisonment; otherwise it is for fear of battery, which may be very light, or for burning of his houses, or taking away, or destroying of his goods, or the like, for there he may have satisfaction by recovery of damages.

Braet. l. 2. fo.
16. b.

This fear, by reason of manas, is well described by Braetson, *Metus autem est presentis, vel futuri periculi causa, mentis trepidatio, et presentem debemus accipere metum, non suspicionem inferendi ejus, vel cujuslibet vani et meticulosi hominis, sed talem qui cadere possit in virum constantem; talis enim debet esse metus, qui in se continet mortis periculum, et corporis cruciatum.*

13 H. 4. Dures
20. 1. Part of the
Institutes, § 419.

But there is a great diversity between the making of a continuall claim, or entry into lands, and the avoiding of a mans own act; for, fear of battery is a good cause to make a claim as neer the land as he dare for fear of battery (for the recontinuance of an ancient right is favoured in law) but it is no cause to avoid his own act; wherein it is observable, how fear of imprisonment (which is a manner of captivity) is more grievous and odious in law, then the fear of battery.

* See the stat. de
modo levand.
Fines.

Li. 4. f. 127, &c.
Beverlies case.

Rot. Parliam.

50 E. 3. nu. 127.

6 E. 3. 39. 17 E.

3. 76. 17 Aff. 17.

13 E. 3. Audita

querela 26. 20 E.

3. ibid. 27. 18 E.

3. 29. 21 E. 3.

24. 27 Aff. 53.

8 H. 6. 30. 15 E.

4. 5. 1 ri. 7. 15.

16 H. 7. 5. b.

6 H. S. Saver

def. Br. 50.

F. N. B. 104. k. l.

16 Eliz. Dier.

3 H. 6. 10.

7 H. 6. 38.

See more of this matter in the first part of the Institutes, *ubi supra*.

(14) *Ratione dimissionis.*] Here, as in many other places [demise] is applied to an estate either in fee simple, fee-tail, or for term of life, and so commonly it is taken in many writs.

* But this act extendeth not to every kinde of demise or conveyance; for if the demise or conveyance be by fine or other matter of record, &c. this branch extends not to it, for regularly conveyances, or other acts of record knowledged, or made by one that is *non compos mentis*, or by dures of imprisonment, are unavoidable by him or his heirs by law: hereof see Beverleys case, lib. 4. fol. 127.

And such conveyances, or other acts of record knowledged, or made by an infant, are also unavoidable, unlesse he doth avoid them by writ of error, or *audita querela*, during his minority; and therefore this branch is to be understood of alienations made *in pais*, and not by matter of record.

A recovery by default against an infant is erroneous, and so is a recovery by default against a man in prison, though he be lawfully imprisoned; but the infant must reverse it by writ of error during his minority, because his infancie must be tryed by inspection, but the man in prison may reverse it when he will.

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1. Part of the

Institutes, § 433.

C A P. XLIX.

CHANCELLOR, treasurer, justices, ne nul de councel (1) le roy, ne clerke de la chauncery, ne del eschequer, ne de justice, ne dauter minister, ne nul del hostel le roy, ne clerk, ne lay, ne puis resceiver esglise, ne advowson de esglise, ne terre, ne tenement in fee

THE chancellor, treasurer, justices, nor any of the king's council, no clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the king's house, clerk ne lay, shall not receive any church, nor advowson of a church, land,

per done, ne per achate, ne a ferm', ne a champerty, ne en auter maner, tanque come le chose est en plee devant nous, ou devant ull' de nous ministr', ne nul lower ent soit pris. Et qui encounter cest chose face, ou per luy ou per auter, ou nul [bargaine ent] face, soit punie a la volunt le roy (2), auxi-bien celui qui le purchasera, come celui qui le fra (3). 11 E. 1. Champertie
I. Articuli super Chartas, cap. 11.

land, nor tenement in fee, by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers; nor shall take no reward thereof. And he that doth contrary to this act, either himself, or by another, or make any bargain, shall be punished at the king's pleasure, as well he that purchaseth, as he that doth sell.

(Fitz. Champerty, 1. 5, 6. 8. 12. 14, 15. Hob. 117. 3 Ed. 1. c. 25. 28 Ed. 1. c. 11. Regist. 182, 183. Rast. 119. 33 Ed. 1. Stat. 2 & 3.)

(1) *Chancellor, treasurer, justices, ne nul de councel, &c.*] This is a law of addition and explanation for the statute of W. 1. cap. 25. *Purveiant que nul minister le roy, &c.* It was doubted, whether the chancellor, treasurer, justices, and those of the kings counsell, being persons of such eminencie, were within these words [*nul minister le roy*,] and therefore this act by way of addition and explanation doth adde, *chancellor, treasurer, justices, et counsell le roy.*

Also this act is an addition to W. 1. cap. 28. for that extendeth but to the clerks of the king, or of the justices; this act addeth, clerks of the chancery, and of the exchequer, and of any other officer; it addeth also those of the kings house, be they of the clergie or laity; and also that they shall take no reward, &c.

And it is to be observed, that neither the chancellor, treasurer, any of the justices, or any of the kings counsell, nor any clerk herein mentioned, nor any of the kings house of the clergie or laity shall (hanging the plea) receive any advowson, land or tenement, by gift, purchase or farm, either for champerty or otherwise; so as none of these persons here prohibited can acquire any advowson, land, or tenement, depending the plea, though it be *bona fide*, and not for champerty or maintenance; partly in respect of their greatness, and partly in respect of their places, both in the kings court, and in the courts of justice; so as the very countenance and places of these men, when they become interested in the land (*co ipso*) are apparent hinderances of the due and indifferent proceeding of law and justice. An excellent law and worthy to be known, and most necessary to be put in execution; so as true it is, that if any other person purchase *bona fide*, depending the suit, he is not in danger of champerty: but these persons here prohibited cannot purchase at all, neither for champerty nor otherwise, depending the plea. But these persons here prohibited must be charged upon this act, and not for champerty, unless they maintain.

And this is a great addition to the statute of W. 1. cap. 25. which extended onely where the purchaser (*pendente placito*) did maintain.

And in these cases prohibited by this law, the childe cannot in-fesse the father, nor the father his childe, or the like, as they may do upon the other statutes,

30 Ass. p. 3. 32 E. 3. Champerty 6. where the cases were of some of these persons, otherwise they could not be law. 4 E. 2. ibid. 12, &c. F.N.B. 172. E. 22 E. 3. 10. 8 E. 4. 1.

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6 E. 3. 33. F.N.B. 172. Pl. Com. 28.

And the prohibition here for taking of rewards is very remarkable.

(2) *Soit punie a la volunt le roy.*] These words are expounded before upon W. 1. cap. 25.

See the statute of Conspiracie, Simile. 33 E. 1. 32 H. 8. cap. 9. Simile.

And where both the said statutes conclude in effect concerning the punishment, *Et que le fra*; this act addeth, *auxibien celuy que le purchasera, come celuy que le fra*, that is, both the giver, and the taker.

W. 1. ca. 25. 28. 28 E. 1. ca. 11. 32 H. 8. ca. 9.

See the statute of W. 1. cap. 25. & 28. and the statute of 28 E. 1. cap. 11. and lastly, the statute of 32 H. 8. cap. 9. whereby all former statutes concerning maintenance, champerty, and imbracery are confirmed, and commanded to be put in due execution, and by that statute excellent provisions are made concerning the same.

31 E. 3. Champerty 5. See the statute of 11 E. 3. Vet. Magna Chart. stat. de Champerty.

(3) *Auxibien celuy que le purchasera, come celuy que le fra.*] And yet the party grieved may have his action against the purchaser onely, if he will.

We have been the more brief in exposition hereof, because we have treated of this subject before in the exposition of the statute of W. 1. cap. 25. & 28. and shall have more occasion to speak hereof when we come to the said act of 28 E. 1. cap. 11.

The cause wherefore this chapter was published in French, was, for that the said two chapters of W. 1. whereunto this act maketh additions, were likewise published in French.

See *articuli super chartas*, cap. 11.

C A P. L.

OMNIA prædicta statuta incipiant conservari (1) ad festum Sancti Michaelis (2) proximo venturum, ita quod occasione aliquorum delictorum contra aliquod prædictorum statutorum citra prædictum festum perpetratorum, poena delinquentibus, de quibus mentio fit in statutis, non infligatur. Super vero statutis in defectum legis, et ad remedia editis, ne diutius querentes eum ad curiam regis venerint recedant de remedio (4) desperati, habeant breviam suam in suo casu provisa (3), sed non placent' usq; post festum Sancti Michaelis supradictum.

ALL the said statutes shall take effect at the feast of St. Michael next coming, so that by occasion of any offence done on this side the said feast, contrary to any of these statutes, no punishment (mention whereof is made within these statutes) shall be executed upon the offenders. Moreover, concerning the statutes provided where the law faileth, and for remedies, lest suitors coming to the king's court should depart from thence without remedy, they shall have writs provided in their cases, but they shall not be pleaded until the feast of St. Michael aforesaid.

(1) *Omnia prædicta statuta incipiant conservari, &c.*] This was very justly added, to the intent that all men dwelling far or near might be well informed of these laws before they were punished by them; the parliament begun *post Pasch.* and hereby day was given untill the feast of Saint Michael.

(2) *Ad*

(2) *Ad festum Sancti Michaelis.*] Albeit there be two feasts of Saint Michael, Saint Michael the Archangel, and Saint Michael *de monte tumba*, commonly called, Saint Michaels in the mount in Cornwall; yet that feast * that is most notorious and of greatest account is to be taken, and that is the feast of Saint Michael th'archangel celebrated on the 29 day of September, and not the feast celebrated the 16 day of November.

Note, that both were the feasts of Saint Michael th'archangel, but the feast of Saint Michael the 29 of September is the most notorious, both in legall proceedings, as *octabis Michaelis*, &c. and never *octabis Michaelis arch'*; and common estimation for payment of rents, beginning and ending of leases, and the like.

(3) *Super vero statutis in defectum legis et ad remedia editis, ne diutius querentes, cum ad curiam regis venerint, recedant de remedio desperati, babeant breviam suam in suo casu provisam.*] *Ad remedia*; that is when any the statutes made at this parliament provide remedy for the party grieved, he shall have an action grounded upon this act for his relief therein; and these words [*ad remedia*] do distinguish them from those acts which give the penalty to the king alone. And hereupon they are called in ancient authors, *brevia remedialia*, which are to be framed upon these acts by learned men, whereof Fleta speaking of the masters of the chancery, saith, *Ipsi autem collaterales et socii cancellarii esse; dicuntur præceptores eo quod breviam (causis examinatis) remedialia fieri præcipiunt.* And sometimes they are called, *brevia magistralia*, because (being out of course) it is a masters piece to frame them as they ought.

(4) *Recedant de remedio.*] See before in the exposition upon the 24 chapter of W. 2. the like clause.

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STATUTUM de CIRCUMSPECTE AGATIS.

Editum Anno 13 Edw. 1.

REX talibus iudicibus salutem. Circumspecte agatis (1) de negotiis tangentibus episcopum Norwicensem (2), et ejus clerum, non puniend' eos si placitum tenuerint in curia Christianitatis (3) de his que mere sunt spiritalia (4), viz. de correctionibus quas prælati faciunt pro mortali peccato, viz. pro fornicatione, adulterio (5) et hujusmodi (6); pro quibus aliquando infligitur pena corporalis, aliquando pecuniaria (7), maxime si convictus fuerit de hujusmodi liber homo. Item si prælatus puniat pro cimeterio non clauso, ecclesia dispersa (8), vel non decenter

THE king to his judges sendeth greeting. Use yourselves circumspectly in all matters concerning the bishop of Norwich and his clergy, not punishing them if they hold plea in court christian of such things as be meer spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometime pecuniary is enjoined, specially if a freeman be convict of such things. Also if prelates do punish for leaving the church-yard unclosed, or for that the

decenter ornata (8), in quibus casibus alia pœna non potest infligi quam pecuniaria. Item si rector petat versus parochianos oblationes (10) et decimas (11) debitas vel consuetas (12), vel si rector agat contra rectorem de decimis maioribus, vel minoribus, dummodo non petatur quarta pars (13) valoris ecclesie. Item si rector petat mortuarium (14) in partibus ubi mortuarium dari consuevit. Item si prælatus aliqujus ecclesie, vel advocatus petat à rectore pensionem (15) sibi debitam, omnes hujusmodi petitiones sunt faciend' in foro ecclesiastico. De violentia manuum iniectione in clericum (16), et in causa diffamationis concessum fuit alias (17), quod placitum inde teneatur in curia christianitatis, cum non petatur pecunia, s. d. agatur ad correctionem peccati, et similiter pro fidei læsione (18). In omnibus prædictis casibus habet judex ecclesiasticus cognoscere regia prohibitione non obstante.

the church is uncovered, or not conveniently decked, in which cases none other penance can be enjoined but pecuniary. Item, if a parson demand of his parishioners oblations or tithes due and accustomed, or if any parson do sue against another parson for tithes greater or smaller, so that the fourth part of the value of the benefice be not demanded. Item, if a parson demand mortuaries in places where a mortuary hath been used to be given. Item, if a prelate of a church, or of a patron, demand of a parson a pension due to him, all such demands are to be made in a spiritual court. And for laying violent hands on a clerk, and in cause of defamation, it hath been granted already, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin, and likewise for breaking an oath. In all cases afore rehearsed, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

(13 Rep. 41. 7 Rep. 44. 5 Rep. 67. 8 Ed. 4. 13. Fitz. Prohibition, 18. 20. 4 Rep. 20. Kel. 39. 22 Ed. 4. f. 20. Bro. Prohibition, 18. 21. Bro. Act. sur le case, 115. 38 H. 6. f. 29. 11 H. 4. f. 88. Regist. 36. 45. 50. 51. 57, &c. Rast. pla. 483. 9 Ed. 2. stat. 1. c. 1.

Rot. Parl. 25 E.
3. Stat. 3. nu. 62.
19 E. 3. jurisd.
28. 27 Ass. p. 7.
10 H. 4. 1.
12 H. 7. 23.
Pl. Com. 36. b.
2 E. 6. c. 13.
versus sinem.
1. 4. fol. 47. inter
Palmer & Thorp.
1. 5. fol. 67. 1. 7.
fol. 44. Pl. Com.
36. b.

* [488]

Glanv. 1. 12. c. 3.
21. Brad. 1. 5.
fo. 463. &c.
sæpe alibi.
Britton 226.
&c. sæpe alibi.
Fleta lib. 6. ca.
41. Regist. 359.
W. 2. cap. 5.
2 E. 3. 27.
Smith de rep.
Anglo. um. 1. 3.
c. 5.

(1) *Circumspecte agatis.*] There was also at this parliament holden at Westminster anno 13 E. 1. a writ devised, called *circumspecte agatis de negotiis tangentibus episcopum Norwicensem, et ejus clerum.*

Though some have said that this was no statute, but made by the prelates themselves, yet that this is an act of parliament, it is proved not onely by our books, but also by an act of parliament.

(2) *De negotiis tangentibus episcopum Norwicensem.*]

The bishop of Norwich is here put but for example, but it extendeth to all the bishops within this realme.

* (3) *In curia christianitatis.*] So called, because as in the secular courts the kings lawes doe sway and decide causes, so in ecclesiasticall courts the lawes of Christ should rule and direct, for which cause the judges in those courts are divines, as archbishops, bishops, archdeacons, &c. Linwoods words are these, *In curia christianitatis, i. ecclesie, in qua servantur leges Christi, cum tamen in foro regio servantur leges mundi. In libro rubeo in scaccar' inter leges H. 1. thus it is contained, Sicut antiqua fuerat institutione formatum salutari regis imperio vera nuper est recordatione formatum generalia comitatum placita certis locis et vicibus, &c. intersint autem episcopi, comites, vicedomini, vicarii, centenarii, aldermani, præfeci, præpositi,*

præpositi, barones, vavasores, tingreuii, et ceteri terrarum domini diligenter intendentes, ne malorum impunitas, aut gravium pravitas, vel judicum subversio solita miseros laceratione conspiciant. Agantur primo debita veræ christianitatis jura, secundo regis placita, postremo causæ singulorum dignis satisfactionibus expleantur.

And if any desire to look before the conquest concerning this matter, he may read amongst the laws published by king Edgar, *Celeberrimus autem ex omni satrapia conventus bis quotannis agitor, cui quidem illius diocesis episcopus et aldermanus intersunt, quorum alter jura divina, alter humana populum edocet.*

Thus much by reason of this word [*christianitatis*] having been said, let us return to our act.

(4) *Mere spiritualia.*] *Sic dicta, quia non habent mixturam temporalium:* they are here called meere spirituall, for that they have no mixture of the temporalities, and because they are corrections *pro salute animæ.*

Britton saith, *Que seint esglise eyt consance de juger de pure spiritualite; heresie, ichismes, holy orders, and the like are mere spirituall things; note it appeareth by the constitution of John Stratford, archbishop of Canterbury in a synod in London anno domini 1380. §. quidam etiam, &c.* that administration of the goods of a man dying intestate, was granted to ordinaries, *consensu regis et magnatum regni Angliæ tanquam pro jure et ecclesiastica libertate ab olim extiterit ordinatum.* And Linwood saith, that probate of testaments, *de consuetudine Angliæ, et non de jure communi,* belong to court christian: which I have added for three causes.

1. That these things being temporall, and not meere spirituall, as our act speaketh, belonged *not ab initio* to the court christian.

2. That the ecclesiasticall judges derive their jurisdiction therein by parliament, and the custome of the realme, and not from any foreign power.

3. And lastly, that herewith our records and books doe accord and agree.

(5) *Pro mortali peccato, viz. fornicatione, adulterio, &c.*] There be two examples put in particular of meere spirituality for correction of these offences.

In ancient time the kings courts, and specially the leets had power to enquire of, and punish fornication and adultery by the name of Letherwite, and it appeareth often in the book of Domesday that the king had the fines assessed for those offences which were assessed in the kings courts, and could not be inflicted *in curia christianitatis.*

(6) *Et bujusmodi.*] These are to be taken for offences of like nature, as the two offences here particularly expressed be, as solicitation of any womans chastity, which is lesser then these, and for incest, which is greater; and herewith agreeth Linwood, who expounding this act saith, *Non intelligas de omni mortali peccato, sed de tali, cujus punitio de sua natura spectat ad forum ecclesiasticum; nam si de ratione cujuslibet peccati mortalis cognosceret ecclesia, sic periret temporalis gladii jurisdictio.*

(7) *Pro quibus aliquando infligitur pœna corporalis, aliquando pecuniaria.*] Here *pœna pecuniaria* must be intended by way of commutation of penance, as it is clearly expounded by the statute of *Articuli Cleri*; item *si prælatus imponat pœnam pecuniariam*

II. INST.

3 H

alicui

F. N. B. 41, &c.
Linwood de foro
compet. cap.
Circumspecte
agatis, fol. 71.
Liber rub. in
custod. rem.
regis. cap. 43.
fol. 41.

Int' leges Regis
Edgari cap. 5.
Lamb. verbo Se-
nator, Alder-
man, or Elder-
man. i.

Senator, which
signifieth the
Sherive, i. Præ-
positus, seu cus-
tos comitatus.

Britton fol. 11. b.
Bracton l. 5. fol.
403, &c.

Fleta l. 2. cap.
53. l. 6. ca. 36.

&c. Linwood
cap. de foro
compet. fol. 7.

li. 7. fo. 44.
Kennes Case.

See hereafter in
this Chapter

verbo Mortuary.

Linwood ubi sup.

2 R. 2. tit.

Testam. 4.

12 H. 7. 12. b.

See hereafter
verbo Mortuary.

Linwood ubi sup.

Kennes case ubi
supra.

Linwood ubi sup.

Kennes case ubi
supra.

Linwood ubi sup.

Kennes case ubi
supra.

Linwood ubi sup.

Kennes case ubi
supra.

Linwood ubi sup.

Kennes case ubi
supra.

Linwood ubi sup.

Kennes case ubi
supra.

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Art. Cleri,

cap. 2.

Britton 11. b.

F. N. B. 53. 2.

alicui pro peccato, et repetat illam, regia prohibitio locum habeat: and so doth Britton take it.

Vet. Mag. Chart.

Vide artic' contra prohibi' regiam Vet' Magna Charta, pro cæmeterio non clauso.

Register.

Brit. fo. 12.

lib. 5. fo. 67.

[Jeffreys case.]

The parishioners ought to reparaire the inclosure of the church-yard, because the bodies of the more common sort are buried there, and for the preservation of the burials of those, that were, or should have been whiles they lived the temples of the Holy Ghost: and *cæmeterium* is derived of the Greek verb *κοιμάω*, that is, *dormio*, and therefore *cæmeterium est quasi dormitorium, quia mortui dormire dicuntur usque ad resurrectionem*. And also if the church-yard be not decently inclosed, the church which is *domus Dei* cannot decently be kept, and therefore this the parishioners ought to doe *per consuetudinem notoriam et approbatam*, and the consens thereof is allowed by this act.

Regist. 44. b.

[8] *Ecclesia discooperta, vel non decenter ornata.*] In the same manner the parishioners by this act ought to reparaire the church, for that it is the place where divine service is celebrated, and the bodies of the parishioners of the best quality are buried; in respect whereof this law doth allow the ecclesiasticall court to have consens thereof, and for the providing of decent ornaments for the celebration of divine service.

Regist. ubi

supra.

F. N. B. 50. n.

Britton fol. 11.

[9] *Ecclesia discooperta.*] This is intended not onely of the body of the church, which is parochiall, but also of any publique chappell annexed to it; but it extendeth not to the private chappell of any, though it be fixed to the church, for that must be repaired by him that hath the proper use of it; for *qui sentit commodum, sentire debet et onus*; and this the parishioners ought to doe *per consuetudinem notoriam et approbatam*, and the consens thereof is allowed to them by this act, but the chauncell is to be repaired by the parson, &c.

Regist. 44. b.

[10] *Oblationes, decimas debitas, vel consuetas.*] *Oblationes* in the canon law are thus defined:

Oblationes dicuntur quæcunque à piis fidelibusq; Christianis offeruntur Deo et ecclesiæ, sive res solidi, sive mobiles.

[11] *Decimæ.*] It appeareth by the auncient writ, *de recto de advocacy decimarum*, and by the like ancient writ of *inducavit*, whereof you may reade before in W. 2. cap. 5. *versus finem*, that the right of tithes was tried in the kings court.

† And this appeareth by an act of parliament in anno 18 E. 3. cap. 7. and it is agreed in 4 E. 3. that before the statute (meaning W. 2. cap. 5.) every parson was ousted to demand tithes in court Christian.

Bracton lib. 5. fol. 401. saith, *quod decimæ sunt spiritualitati annexæ*: and Britton, who was bishop of Hereford, and learned in the lawes of this realme, treating of what things the church hath consens, omitteth tithes.

Hereby it appeareth that the recitall in the statute of 1 R. 2. that pursuit for tithes of right ought, and of ancient time did pertaine to the spirituall court, must bee intended by force of former acts of † parliament, (as things annexed to the spirituality) as of W. 2. of this act made in * 13 E. 1. *articuli cleri*, cap. 1. &c. 18 E. 3. cap. 1. and is confirmed by later acts of parliament, as 27 H. 8. cap. 20. 32 H. 8. cap. 7. and 2 E. 6. cap. 13.

Now

Art' contra
proh. regiam
Vet. Mag. Chart.

Art. Cleri cap.

1. 2. E. 6.

cap. 13.

Cap. Cler.

quæst. 13.

Regist. fol. 29.

& 35. F. N. B.

30. b.

† 18 E. 3. cap. 7.

F. N. B. 30. g.

4 E. 3. 27.

38 E. 3. 13.

38 H. 6. 20.

Bract. li. 5. fo.

401.

Brit. ubi supra.

† Int' leges Edw.

Regis, cap. 8.

fol. 128. having

spoken of tithes,

it is said, *Hæc*

prædicavit beatus

Augustinus et

concessa sunt à

rege baronibus

et populo.

Now of tithes there be three kindes, prediall, personall, and mixt, and this act extendeth to them all, and for personall tithes see the statute of 2 E. 6. cap. 13.

And true it is, that of auncient time the parsons did sue for subtraction of tithes in court christian, but if the right of tithes had come in question, it should have been tried by the common law; and therefore *in libro rubeo inter leges Henr. 1.* speaking of pursute for tithes in court christian, it is said, *si rex patiatur*; but at this day it is without question, as hath been said, that for subtraction of tithes the conusans by force of divers acts of parliament doth belong to the ecclesiasticall court.

(12) *Vel consuetas.* By this act *modus decimandi*, reall composition, or by prescription, or custome is established, for hereby are tithes divided into two parts, in *decimas debitas*, and that is *quota pars*, the tenth part, and into *decimas consuetas*, and that is a duty personall due by custome and usage to the parson, &c. in satisfaction of tithes; as a yearely summe of money, or other duty, and these are here called *decimæ consuetæ*, and for this *modus decimandi* the parson, &c. may sue in court christian, and is warranted by this act.

There is also a reall satisfaction for tithes, as if of ancient time land hath been given by the consent of the patron and ordinary to the parson and his successors in satisfaction of tithes out of other lands, this is also a good discharge of tithes, but for this or the like reall satisfaction he cannot sue in court christian, but at the common law: of this reall satisfaction you may reade a notable record in 25 H. 3. which was before the making of this act, and the effect thereof is this:

Sampson Foliot brought a prohibition against Thomas parson of Swindon, *quare secutus est in curia christianitatis de laico feodo ipsius Sampson in Draicot, &c.* the defendant pleaded that *non est secutus placitum, &c. de laico feodo, sed verum vult dicere, et dicit quod revera ceram iudicibus delegatis petiit ab eodem decimas feni de quodam prato in Walcot infra parochiam suam de Walcot, &c. et nihil petiit in parochia de Draicot, &c. Et Sampson dicit quod antecessores sui antiquitus dederunt 2. acras prati ecclesiæ de Draicot, pro decima feni, quam prædictus Thomas petit, et in eodem prato, quas eadem ecclesia adhuc habet, et semper hucusque habuit, unde videtur quod illud quod prædictus Thomas petit decimas est in laico feodo, et quod pratum illud de quo idem Thomas petit decimas est in Draicot sicut breve dicit et non in Walcot, et de hoc ponit se super patriam, &c.* Whereupon severall issues being joined, the jury gave this verdict, that the said Thomas pursued his plea *in curia christianitatis de laico feodo prædicti Sampson, &c. pretendo ab eo decimas feni*, of the said meadow of the said Sampson in Draicot, *unde antecessores sui dederunt ecclesiæ de Draicot duas acras prati pro decima feni quam prædicti Thomas modo petit, et quas eadem ecclesia adhuc habet, et semper hucusque habuit.* And found that the said meadow, &c. did lie in Draicot, &c. and thereupon judgement is given for the plaintiffe in the prohibition, and that he should recover 20. marks damages, &c. Which record, both for the antiquity thereof, and for that it agreeth with our books, being a leading case, I have recited the more at large.

A man seised of 8. acres of meadow, and one of pasture, for the tithes whereof he hath been paid time out of mind v. s. iv. d. afterwards the owner builds a cornmill upon the same, he shall pay no tithes for the cornmill, because the land was discharged *per*

See the act of
2 E. 6. cap. 13.
39 E. 3. juris.
8 E. 4. 14.
7 E. 6. 79.
Doct. & Stud.
166, 167.

8 E. 4. ubi
supra.
F. N. B. 41, 43.

Mich. 25 H. 3.
Coram Rege
Rot. 5.
Wilteih.

See the Register
fo. 34. and
Glanv. li. 12.
cap. 21. for this
forme of writ.

See the like
ground of pro-
hibition, Regiū.
fol. 38.
8 H. 6. 14.
8 E. 4. 14.
F. N. B. 41. g.
& 43. k.

That bounds of
parishes are to be
tried by the com-
mon law.
39 E. 3. 23.
14 H. 4. 17.
5 H. 5. 18.
34 H. 6. 10, 11.
22 E. 4. 24.
12 H. 7. 22.

Mich. 26 and 27
El. in Commu.
Banc. Rot 2617.
Lords case
adjudged.

45 E. 3. c.
31 H. 8. cap.
2 E. 6. ca. 13.
9 H. 5. fol. 9.
50 E. 3. 10.
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M. 9 E. 1. Incip.
10. in com' banc.
Rot. 63. So-
merfet.

See W. 2. c. 5.

Brit. fol. 11. b.
Artic. Cler. c. 1.
10 H. 4. 1.

2 H. 5. 10.
21 H. 8. cap. 6.

21 H. 8. cap. 6.

Inter communia
Hil. 2 E. 2. in
Seacc. post mort.
epif. Bath &
Wel. Tr. 36 E. 3.
ib. post mortem
episc. Cirencest.
Hil. 5 E. 4. ib.
Rot. 47. post
mortem archiep.
Ebor.

* *Muta* cometh
of the French
word, *Mente de
cbiens*.
Lib. Mathei Par-
ker, published
anno dom. 1573.
Rot. clauf.
7 H. 3. m. 16.
Rot. Pat.
36 H. 3. m. 1.
Tit. de consuet.
cap. nullus. f. 19.
See before in this
chapter, verbo
mere spiritualia.

Regist. fol. 47.
F. N. B. 52. b.

modum decimandi: what things be indecimable by the law, and ought not to pay tithe, vide lib. 11. fol. 48, 49. F. N. B. 53. g. &c. see the statute of 45 E. 3. 31 H. 8. cap. and 2 E. 6. cap. 13. for discharge of tithes. I have read of an ancient concord *de modo decimandi*, which is worthy to be read at large, whereof we will give you the effect, *Concordia fact' inter Willum Mallet, et rectorem ecclesiæ de Aure, Heyton, Bathon' et Wellen' dioces' ex una parte, et nobilem virum Jobannem de Acton militem ex altera, de modo decimandi omnia in parochia de Aure per consensum episcopi, et capituli Bathon' et Wellen', unde placitum fuit prius in cur' captum.*

(13) *Dummodo non petatur 4. pars.*] So as at this day in case when one person of the presentation of one patron demand tithes against another person of the presentation of another patron in court christian, amounting to a fourth part, &c. the right of tithes at this day is to be tryed at the common law.

(14) *Mortuarie.*] Or, *a corse present.* *Mortuarium* is a gift left by a man at his death, *pro recompensatione subtractionis decimarum personalium, et oblationum.*

In 2 H. 5. the opinion was against the mortuaries, because they were not contained in the statute (meaning *Artic' Cleri.*)

There is no mortuary due by law, but onely by custome, which is proved by the words of this act, *viz. ubi mortuarium dari consuevit.* And this act alloweth the consens thereof to court christian.

See the statute of 21 H. 8. cap. 6. where mortuaries ought to be paid, for what persons, and how much, and in what case none is due.

Some have said, that the king hath a mortuary after the deceases of every archbishop and bishop; true it is, that the king after their deceases hath six things, *viz.* (to use the words of the records)

1. *Optimum equum sive palefridum ipsius episcopi cum cella, et freno.*
2. *Unam chlamydem sive cloacam cum capella.* 3. *Unum cippum cum coopertorio.* 4. *Unum pelvem cum lavatorio sive aquar'.* 5. *Unum annulum aureum.* 6. *Necnon * mutam canum, quæ* (saith the record) *ad dominum regem ratione prærogativæ suæ spectant, et pertinent.*

And there is a speciall writ that issueth out of the exchequer, after the decease of the bishop, for answering of the same. And in the records this is called, *multa episcopi*, or *multura episcopi*, derived à *multa*, for that it was a fine, or small satisfaction given to the king, that they might have power to make their last wills and testaments, and to have the probate of other mens testaments, and the granting of administrations: for true it is that is said, *Nulla habebant episcopi auctoritatem præter eam quam à rege acceptam referebant, jus testamenta probandi non habebant, administrationis potestatem cuiquam delegare non poterant, nec ipsi quidem testamenta facere de jure communi, dum id illis regnante Henrico 3. concessum erat, et confirmatum vivente Edw. 1. &c.*

Linwpod, who wrote in the reign of H. 6. saith, *Beneficiatus non potest testari de communi jure, sed de consuetudine in Anglia.*

So as this duty, which the king hath after the death of archbishops and bishops, is not any mortuary.

(15) *Si prælatus alicujus ecclesiæ, vel ejus advocatus petat à rectore pensionem.*] This act giveth consens of suit for a pension, when

when a prelate or a prior demand a pension of a parson of a church.

But this must be intended of a pension which had his essence by some ordinance made by the ordinary upon a controversie for tithes, or the like; by which ordinance the tithes are to be enjoined by the one, and he is to pay a pension for the same to the other: for this pension, because it beginneth by an ecclesiasticall act, and by an ecclesiasticall judge, he may take his remedy by force of this act in the ecclesiasticall court; but if a pension be claimed by prescription, there, seeing a writ of annuity doth lye, and that prescriptions must be tryed by the common law, because the common and the canon law do therein differ, they cannot sue for such a pension in the ecclesiasticall court, no more then if a pension be granted by deed by a parson with the consent of the prior and ordinary.

A writ of annuity must be brought therefore at the common law: and all this doth notably appear by a judgment in the next yeer after the making of this statute, where the case was, that the abbot and covent of Leicester did by their deed under their covent seal, bearing date *anno 25 H. 3.* grant to the abbot of Saint Ebrulfe and his successors a yeerly rent or annuity, for certain tithes granted by the abbot and covent of Saint Ebrulfe to the abbot of Leicester and his successors; for which annuity or yeerly rent (being granted out of no lands) the abbot of Saint Ebrulfe brought a writ of annuity against the abbot of Leicester: wherein the judgement was, *Et quia cognitio placiti petendi annuū redditum directe secundum consuetudinem regni spectat ad curiam domini regis, et in ea debet hujusmodi placitari, et prædictus abbas de sancto Ebr. petit quendam annual' redd' sibi debitum per præd' contractum in præd' scriptis contentum inter prædecessorem suum, et prædec' præd' abbatis Leicest', et non aliquas decimas. Considerat' est, quod prædictus abbas de sancto Ebr' recuperet de cætero præd' annum redditum versus præd' abbatē de Leic', et similiter arreragia sua de tempore istius abbatis de sancto Ebr', quæ taxantur per justic' ad lx. l. et abbas de Leicest' in misericordia, &c. Postea venit prædict' abbas de Leicest', et satisfecit præd' abbati de sancto Ebr' de lx. l. ad tres vices, et etiam de aliis arreragiis præd' redditus usq; ad hunc diem a tempore impetrationis brevis, de tempore præd' abbatis de sancto Ebrulpho, &c.*

And upon this diversity this statute is well explained, and all our books reconciled.

See the statute of 21 H. 8. ca. 6. where mortuaries ought to be paid, for what persons, and how much, and in what cases none is due.

(16) *De violenta manuum injectione in clericum.*] Note a diversity between a spirituall man of the church consecrated to the service of God, and goods dedicated to divine service, or meerly ecclesiasticall: for laying of violent hands upon the person of any, *infra sacros ordines*, the ecclesiasticall court hath conusans; but for the violent taking away, or consuming of the ornaments of the church, or goods dedicated to divine service, that court hath no conusans, for that is not given to them; as for taking away of the bible, the book of divine service, the chalice, and the like, or for the taking away of an image out of the church; but remedy must be taken for these at the common law,

3 E. 3. 17. 6 E. 3.
54. 55. 7 E. 3.
40. 41. 17 E. 3.
52. 19 E. 3.
Prescription 98.
31 E. 3. ib. 26.
31 E. 3. Junif.
26. 16 E. 3.
Annuity 24.
40 E. 3. 3. b.
Regist. 38. a.
11 H. 4. 68.
8 H. 6. 23. 7 E. 6.
Dier, 79.

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Pasch. 14 E. 1.
in Banc. R. 69.
Leicest.

7 H. 3. Prohibi-
tion 30.
5 H. 3. Prohibi-
tion 29. 31 E. 3.
B. c. 258. M.
33 E. 3. Rot. 23.
Coram rege cas-
sus prioris sancti
crucis juxta tur-
rim London.
8 R. 2. Monstr.
des faits 184.

Tr. 4 E. 3.
Rot. 100.
Coram rege
Essex. Braçt.
li. 5. fo. 401, &c.
Brit. 11. b. Re-
gift. 34.

Artic. contra
Prohib. Regiam
Vet. Magna
Charta. Artic.
Cleri. cap. 1. 3.
11 H. 4. 81.
18 H. 6. 6.
20 E. 4. 10. b.
Regist. 49. b.
F.N.B. 41. 51. k.
52. f. 53.
* Hil. 7 H. 3.
Prohib. 30.
Regist. 49. a.
Vide supra verbo
Mortuary. Ar-
tic. cont. Pro-
hibit. Regiam.
Vet. Mag. Chart.
Regist. 46, 47,
&c. 54. F.N.B.
51. I. K. 52.
d. m. 5. a. f.
18 E. 4. 6.
22 E. 4. 20.
33 E. 3. Bre.
912. 12 H. 7.
22. Lib. 4. fol.
20. Inter Palmer
& Thorp. Artic.
Cleri. cap. 4.

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Tr. 19 H. 8. Co-
ram rege Spilm.
Report.

30 H. 8. Br.
Action sur le
case 104. M.
22 H. 8.
Coram rege
Spilm. 23 E. 3.
Stat. de La-
bourers.
Vide stat. de La-
bourers. 23 E. 3.
22 Aff. p. 7.
2 H. 4. 10.
11 H. 4. 88.
38 H. 6. 29.
20 E. 4. 10. b.
Kelw. 39.
Braçt. lib. 5. fol.
401. & 406. b.

And I finde a record that William de Brinckle recovered at the common law by verdict, against Otho parson of the church of Beston, x.l. *pro subtractione unius bullæ papalis de ordinibus, alterius bullæ de legitimatione, et tertiæ bullæ de veniam exorantibus pro animabus antecessorum suorum*. And yet these were accounted in those dayes spirituall; but by the ancient common law they have jurisdiction of no goods or chattels, but such as be *de testamento et matrimonio*.

And for laying violent hands upon one of the clergie, the end of that suit is onely *pro salute animæ*, by excommunication, or corporall penance: but if a clergie-man be arrested by proceſſe of law, he cannot for this sue in the ecclesiasticall court. And if the clerk sue in court christian for damages for the battery, he is in case of *premunire*, for in that case the ecclesiasticall judge ought to proceed *ex officio*, onely to correct the sin.

(17) *In causa defamationis concessum fuit alias*.] Where it is said here, *concessum fuit alias*, by it appeareth that the conusans of defamation that concerneth meer spirituality, was granted by act of parliament, implied by this word [*concessum*] for otherwise it could not be granted.

Defamations granted to the conusans of ecclesiasticall judges ought to have their incidents; first, that it concerns matter meerly spirituall, as to call him heretike, schismaticke, or the like: 2. That it concerns meer spirituall matter onely, and not mixt with any matter determinable at the common law. 3. * Although the defamation be meerly and onely spirituall, yet he that is defamed cannot sue there for amends or damages, but the suit there ought to be for correction of the sin, *pro salute animæ*, and they must expresse in particular the defamation in their libell in court christian.

If a man give evidence to an inquest to indict one, he cannot sue for this defamation in court christian.

The prior of Laund libelled in the spirituall court against Robert Lee, and John Lee, for calling the prior churls son, rotten churl, and cankerd churl, and a prohibition was granted, for the words concerned no spirituall matter, and therefore he could not sue for them in the ecclesiasticall court, neither could he have any action for them at the common law.

If a man call one a perjured man, he must take his remedy at the common law.

A sute was in the ecclesiasticall court for calling one false knave; and for the same cause a prohibition was granted, and knave *ab initio* was no word of reproach, but signified a man servant, and a knave-childe a man-childe; and this case was between March and Bêle of Kent.

(18) *Pro læsione fidei*.] This is to be understood where the thing to be done is meer spirituall, and neither temporall, nor mixt with the temporality, be it reall or personall, because the ecclesiasticall court cannot hold plea of the principall: and where they cannot hold plea of the principall, they cannot hold plea of the accessory, *Quia cujus juris (i. jurisdictionis) est principale, ejusdem juris erit accessorium*.

And again, *Jurisdictionem non mutat fidei interpositio, sacramentum præstitum, nec spontanea renunciatio partium, &c. Et illud idem dicendum erit de debitis, et catallis quæ non sunt de testamento, vel matrimonio*.

More

More shall be said of these matters when we come to the statute of Artic. Cleri, anno 9 E. 2. Vide R. book of Entries, 444. Vide Vet. Magn' Chart', part 2. fol. 70. *Prohibitio formata de stat. Articuli Cleri.*

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STATUTUM DE QUO WARRANTO,

Editum anno 18 Edw. I.

Statutum de quo Warranto novum anno 18 E. 1. qualiter brevia de quo Warranto debent terminari, et de cætero terminari.

QUIA brevia de quo warranto et etiam judicia super placita eorundem reddend' diutnam ceperunt dilationem, eo quod justiciarii in judiciis illis reddendis de voluntate domini regis non fuerunt hucusque certiorati: idem dominus rex ad parliamentum suum post Pasch. apud Westm', anno regni sui xviii. de gratia sua speciali (1), et propter affectionem quam habet erga prelatos, comites, et barones, et cæteros de regno suo concessit, quod omnes de regno suo quicunque fuerint, tam religiosi, quam alii, qui per bonam inquisitionem patriæ aut alio modo verificare poterunt (2), quod ipsi et antecessores eorum vel prædecessores usi fuerint libertatibus quibuscunq; (3) de quibus per brevia prædicta fuerint implacitati ante tempus regis Rich' consanguinei sui aut toto tempore suo (4), et hucusque continuerint: ita quod libertatibus illis non sunt abusi (5), quod partes adjornentur ulterius usque certum diem rationabilem coram eisdem justiciariis: infra quem dominum regem adire possint cum recordo (6) justici' sigillo suo signat' et redire. Et dominus rex confirmabit (7) per litteras suas patentes statum eorum. Et illi

FORASMUCH as writs of quo warranto, and also judgements given upon pleas of the same, were greatly delayed, because the justices in giving judgement were not certified of the king's pleasure therein; our lord the king, at his parliament holden at Westminster, after the feast of Easter, the eighteenth year of his reign, of his special grace, and for the affection that he beareth unto his prelates, earls, and barons, and other of his realm, hath granted, that all under his allegiance, whatsoever they be, as well spiritual as other, which can verify by good enquiry of the country, or otherwise, that they and their ancestors or predecessors have used any manner of liberties, whereof they were impleaded by the said writs, before the time of king Richard our cousin, or in all his time, and have continued hitherto (so that they have not misused such liberties) that the parties shall be adjourned further unto a certain day reasonable before the same justices, within the which they may go to our lord the king with the record of the justices, signed with their seal, and also

illi qui non poterunt seisinam antecessorum seu predecessorum verificare eodem modo, quo prædictum est, deducantur et judicentur secundum legem et consuet' regni (8). Et illi qui habent chartas regales secundum chartas illas judicentur (9). Præterea dominus rex de gratia sua speciali concessit, quod omnia judicia quæ reddenda sunt in placitis de quo warranto per justic' suos apud Westm' post Pasch' prædictum, et pro ipso domino rege si partes quæ amiserunt ad ipsum dominum regem revenire voluerint, tale habebunt remedium de gratia domini regis sicut superius scriptum est (10). Concessit etiam idem dominus rex ad parcend' misit et expensis populi de regno suo: quod placita de quo warranto de cætero placitentur et terminentur in itinere justic' (11), et quod placita adhuc pendentia readjornentur in singulis com' suis usque ad adventum justiciar' in partibus illis.*

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also return; and our lord the king, by his letters patents, shall confirm their estate. And they that cannot prove the seisin of their ancestors or predecessors in such manner as is before declared, shall be ordered and judged after the law and custom of the realm; and such as have the king's charter shall be judged according to their charters. Moreover, the king of his special grace hath granted, that all judgements that are to be given in pleas of *quo warranto*, by his justices at Westminster, after the foresaid Easter, for our lord the king himself, if the parties grieved will come again before the king, he of his grace shall give them such remedy as before is mentioned. Also our said lord the king hath granted, for sparing of the costs and expences of the people of his realm, that pleas of *quo warranto* from henceforth shall be pleaded and determined in the circuit of the justices, and that all pleas now depending shall be adjourned into their own shires, until the coming of the justices into those parts.

(Fitz. Brief, 886. Kelw. 137, &c. Bro. Quo Warranto, 1, 2, 3, 4, 6, 8, 11. Bro. Prescription, 10, 14, 18, 32, 33, 34, 52, 54, 64, 65, 73, 83, 98, 107, 108. Bro. Franchise, 4, 10, 14, 22, 26, 37. Fitz. Conusance, 16, 19, 21, 26, 30, 31, 36, 39, 46, 51, 54, 57, 60, 61, 62, 63, 64. Rail. 540.)

The mischief before this statute, as here it is rehearsed, was that there had been [*diutina dilatio*] in writs of *quo warranto*, because the judges would not proceed to judgement (the same being finally) without being certified *de voluntate regis* by the writ *de libertatibus allocandis*, which was not onely a great delay, but a great charge to the subject: but the truth is, that this kings officers to get thanks of the king by filling of his cofers, caused very many writs of *quo warranto* for liberties to be brought; for where it is said in our chronicles, that those writs of *quo warranto* were for lands and tenements, therein they are mistaken, for it appeareth that after, that is to say, in the 31 yeare of his raigne the king did bring a *quo warranto* against the lady of S. to know by what warrant she claimed to hold the manor of C. which belonged to his crown, as that which of ancient time was ancient demesne; and there it is affirmed and not denied, that this was the first writ that ever was seen to be brought for lands: but certaine it is, that there were an exceeding number of writs of *quo warranto* brought as well against the prelates and other of the clergy, as against the nobles and others of the

31 E. 1. bre. 886.
Vide Bract. l. 5.
357. Polydor,
Trivet. Abingdon.
Hollingf. pag. 280. a. b.

the realme for their liberties, franchises, and priviledges, for that partly by length and proces of time, and partly during the trouble-some times and civill broiles and wars in the raignes of king John and H. 3. many of their charters, records of allowances, and other evidences and muniments were destroyed, wasted or made away; amongst others a *quo warranto* was brought against John Warren earle of Surrey, who appearing before the justices spake boldly and stoutly against this kinde of proceeding, as our histories doe testifie.

Certaine it is, that as well the lords spirituall and temporall, as the commons assembled in this parliament did complain hereof to the king, and besought him that he would be pleased of his grace and favour, for it was a legall course which was attempted and prosecuted in the kings name, but a matter of great rigour and extremity invented and eagerly followed by his officers, to the generall distaste and griefe of the whole realme.

The noble and wise king knowing that *summum jus was summa injuria*, and not intending to take advantage of the extremity of his laws in so hard a case did of his grace and favour (for so the act speaketh) *ex speciali gratia et etiam propter affectionem quam habet erga prælatos, comites, barones, et cæteros de regno suo*, provide by this act remedy for the said mischiefe.

Bracton and Fleta treating of a *quo warranto*, both of them almost *totidem verbis* sayen, *Est etiam alia actio, quæ dicitur duplex, in uno brevi, et ubi duæ concurrunt actiones, scilicet in personam, et in rem: primo in personam, quod quis sit ad respondendum quo warranto teneat aliquam libertatem seu aliam rem. In rem, cum præterea addatur in fine quam rex clamat ut jus et hæreditatem suam vel eschaetam suam, vel de antiquo dominico coronæ suæ, vel hujusmodi, vel quam talis clamat in N. contra coronam et dignitatem regis.*

(1) *De gratia sua speciali.*] This, as hath been said, is an act of grace, for it bindeth the king in this particular of his prerogative, *quod nullum tempus occurrit regi*, for by this act continuance of possession of liberties from the beginning of the raigne of R. 1. till this act, which was under an hundred yeares, should be a barre to the crowne, if so it were found by inquisition, which was the time of prescription that bound the subject in case of prescription.

(2) *Qui per bonam inquisitionem patriæ, vel aliquo alio modo verificare poterint, &c.*] This is as much to say, as to prove by inquisition, or verdict of the country, who are to enquire of the fact, that is, of the possession by the time aforesaid, or to prove by matter of record (whereof juries are not to enquire) that is, by allowance before justices in eyre, &c. implied necessarily in these words [*vel aliquo alio modo*] that must be *alio modo*, then by matter in *fact* inquirable by the country; so as albeit it be said, that a possession of liberties warranted also by allowance is within this statute, that doth not exclude, but that a possession found by inquisition is within the expresse letter and meaning of this act.

(3) *Libertatibus quibuscunque.*] This extends to all liberties, as well to those that lie in point of charter, as consuans of pleas, felons goods, and the like; as to those that may be claimed by prescription, as waife and stray, and the like.

The remedy is conformable to the mischiefe, for the mischiefe was, as hath been said, concerning liberties, and not concerning lands; and the *quo warranto* was framed for franchises which be-

Bract. l. 5. fo. 367. Fleta, l. 3. cap. 9.¹

Acts of grace.
Mag. Chart. c. 8.
W. 2. ca. 10. 29.
2 E. 3. fo. 28, 29.

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First part of the
Instit. sect. 190.
2 E. 3. 28, 29.
Roger Mortimers case upon
this branch.

2 E. 3. ubi supra.

31 E. 1. bre. 886.
Bract. ubi supra.
Tr. 29 E. 1. cor-
ram rege. Rot.
57. the bishop of
Durham's case.

long

long to the crown, and such as the subject hath, are derived from the crown, *Libertates regales ad coronam spectantes ex concessione regum à corona exierunt.*

(4) *Ante tempus consanguinei sui Ric. aut toto tempore sui.*] This is king Richard the first, and here is called *consanguineus*, because the king derived not lineally from him, for he was elder brother to king John, who was grandfather to king Edw. 1. Note here this disjunctive [*aut*] so as the time of prescription, as hath been said, in the case of a subject is the time limited by this act.

(5) *Ita quod libertatibus illis non sunt abusi.*] This clause extendeth not onely to misuser, disuser, and non-user of liberties, but to *faux* claime of them, and the like.

(6) *Regem adire possint cum recordo.*] Here is an excellent pattern, that the king be informed by the judges, and by the record it self, before he make any graunt or confirmation thereof; so carefull were they in those dayes, that the king, before he passed any thing, might bee truly informed.

(7) *Et dominus rex statum eorum affirmabit.*] In those dayes, such faith were given to verdicts of twelve men, as they were *vere dicta*, and *dicta veritatis*, so as upon one inquisition, &c. the king by this act was to affirme the liberties according to the verdict, &c.

(8) *Deducantur et judicentur secundum legem communem.*] That is according to the kings prerogative of *nullum tempus occurrit regi*. Hereby it appeares that the kings prerogative is part of the law of England, and comprehended within the same.

(9) *Et illi qui habent chartas regales secundum chartas illas et earundem plenitudinem judicentur.*] Here is an excellent rule for construction of the kings letters patents, not only of liberties but of lands, tenements, and other things which he may lawfully grant, that they have no strict or narrow interpretation for the overthrowing of them, *sed secundum earundem plenitudinem judicentur*, that is, to have a liberall and favourable construction for the making of them available in law, *usq; ad plenitudinem*, for the honor of the king.

Also hereby is implied that they are to be construed *secundum earundem plenitudinem*, that is, as fully and beneficially as the law was taken at that time when they were made: and certainly these aunient laws were directions to the sages of the law, for the construction of the kings charters, and letters patents, as it appeareth in our books.

(10) *Præterea dominus rex de gratia sua speciali concessit, quod omnia judicia que reddenda sunt in placitis de quo warranto per justic' apud Westm' post Pasch' prædict', et pro ipso domino rege, si partes quæ amiserunt ad ipsum dominum regem revenire voluerint, tale habebunt remedium de gratia domini regis, sicut superius est concessum.*] This was a speciall grace indeed of the king, that though judgements had been given in any of his courts at Westminster since the feast of Easter in pleas of *quo warranto* for him against any of his subjects (which judgements in law against the subjects were final) yet, those judgements notwithstanding, the parties grieved should be within the remedy of this act.

(11) *Concessit etiam idem dominus rex ad parcend' missis et expensis populi de regno, quod placita de quo warranto de cætero et placitentur et terminentur in itineribus justiciar'.*] The costs, charges, and expences of the subjects in these cases were excessive, and therefore,

[497]

Lib. 6. fol. 5, 6.
Sir John Molins
case.

6 E. 3. 54, 55.
7 E. 3. 40, 41.
18 E. 3. consens.
39. 34. Ass. 14.
40 Ass. 23.
12 H. 4. 12.
14 H. 6. 12.
33 H. 6. 22.
35 H. 6. 54.
9 H. 7. 11.
10 H. 7. 13, 14.
36 H. 7. 9.

to meet with this mischief, and that the subject might receive justice in his own country, as it were at his owne doores, it is likewise of the kings speciall grace that pleas of *quo warranto* should be heard and determined in the eyres of the justices.

Of this branch we finde a notable case in our books, and I will cite the case as I finde it of record, and as it may be gathered in our books. The archbishop of York was in possession of prisage of wines in the port of Hull, and in the raigne of E. 2. in the time of John archbishop, the same franchise was seised into the kings hands; after the decease of John archbishop, William archbishop his successor sued in parliament in the raigne of E. 3. by petition of right to be restored to the said franchise; and afterward by parliament the petitioner was restored to the possession of the said franchise, and by the same award it was adjudged that the said William archbishop the petitioner should answer the king, when and where he pleased; and the like award was made upon the petition of the said William archbishop in the parliament the morrow after the feast of S. Catherine in the fourth yeare of the same king; whereupon the king brought a writ of *quo warranto* against the said William archbishop returnable in the court of common pleas, to know by what warrant he claimed to have prisage of wines in the port of Hull; Parning that famous serjant (who after was chiefe justice, and after that lord treasurer of England, and lastly lord chauncellor of England) of counsell with the archbishop, pleaded to the jurisdiction of the court, and demanded judgement, if the archbishop ought to make any answer there, for that king Edward, grandfather of E. 3. made a statute (intending this statute of 18 E. 1.) which provided, that the pleas of *quo warranto* should be pleaded before justices in eyre in the counties, and that it was ordained by a statute made in the time of king E. 3. at his parliament at Northampton (which was in 2 E. 3.) that by a writ under the great, or privy seale, no disturbance should be that common right should not be done to all, and wee intend not (saith hee) that against the said statute, which is a law common to all, that wee ought to answer in this court. The matter concerning this act of 18 E. 1. was not denied, but sir William Herle chiefe justice, that gave the rule, relying upon the award in parliament, that the archbishop should answer the king when and where hee would, and there it is said, that the award of parliament was the highest law that could bee, and thereupon serjant Parning answered over.

5 E. 3. 65,
6 E. 3. 5, &c.

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Now when justices in eyre ceased, then this branch for the ease of the subject, and for saving of their costs, charges, and expences, lost his effect, for with justices of eyre this branch lived, and with them it died.

Some have supposed that Henry the second, did first institute justices in eyre, whereof one saith, *Justiciarii itinerantes constituti per H. 2. 1. Qui divisit regnum suum in sex partes, per quarum singulas tres justiciarios itinerantes constituit*; and they likewise agree, *quod hoc institutum sub Edwardo 3. evanuit.*

Rog. Hovenden
poller. p'te anna-
lium, fol. 313.
Mat. Paris.
Camden Brit.
129.

Wherein how men otherwise learned, but not skilfull in legall antiquities have mistaken both these points, we shall in a word or two satisfie the learned reader.

These justices itinerants, were also called *perlustrantes*; they were first instituted *ad dilationes amputandas, et ad subditorum labores, sumptusque sublevandos.*

Lucubr. Ock-
ham.

It

Mirror, c. 2.
§ 15.

Bract. l. 3. fo.
108. 115, 116.
&c. Brit. fo. 127,
&c. Fleta, l. 1.
c. 15, &c. 2 E. 3.
27. 4 E. 3. 41.
6 E. 3. 55.
23 E. 3. 21.
6 E. 2. Aff. b.
496. 14 H. 7.
21. 15 H. 7. 5.

Mirror, c. 4.
§ Le office des
justices in eire.
ca. 5. § 1. The
books above said,
ubi supra.

1 Sam. c. 7.
ver. 16.

[499]
Rot. Parliam.
an. 6 R. 2.
nu. 35. 16 R. 2.
nu. 12.

It appeareth by the Mirror, who had seene the old rolls in the raignes of ancient kings, and namely of king Alfred, and wrote of the lawes from the time of king Arthur, who saith, *Que auncientment soloient les royes en proper persons eroer de pais in pais pur enquirir, oier et terminer les peches, et pur redresser de torts, et ceux queux ne sont my attaine en tielz eires des personel trespasses faitz avant remeint al judgement de Dieu. Et puis pur multiplication de peches ne purront my les royes tous faire per eux mesmes et pur ceo ilz envoieront leur commissaries, que sont ore appels justices errants, que nount power de oier et terminer nul personel trespassse forsque pur chose attaine, et nient termine in le darraigne eire ou puis fait* (which agreeth with our books) and further saith, *Estoit auncient ordein que les royes per eux, ou per leur chiefe justices, ou per justices generals a tous pleas oier et terminer errassent de 7. ans, in 7. ans per my tous counties pur recevoir les rolles de tous justices assignes, des coroners de inquiries, des escheators, de viscounts, de bundreders, de bailies, et de tous sineschals, &c.* And again, *Cheacun pais soloiet destre garnie per 40. jours per general summons, &c.* All which agreeth with our books; and after he saith, *Abuson est que justices et leur ministers, que occient le gent per faux judgement, ne sont distreints al sere de autres homicides, que fist le roy Alfred que fist pender 44. justices in un anne tant come homicides pur leur faux judgements*: and there he nameth those corrupt justices, which is to be intended of justices itinerant, for there were not so many resident.

And the institution of justices itinerant, and the circuit of justices in the countries had his ground from holy scripture, for there it is said, *Judicabat quoque Samuel Israellem cunctis diebus vite sue, et ibat per singulos annos circueiẽs Bethel, et Galgala, et Masphatti; et judicabat Israellem in supradictis locis, reuertebaturque in Ramatha; ibi enim erat domus ejus, et ibi judicabat Israellem.*

As to the second point, that justices in eyre should cease in the raigne of Edward the third, they have not onely erred *in fonte*, but *in fine* also, for they ceased not in the raigne of king Edward the third, for it is enacted by act of parliament after that kings raigne, (in respect of the troubles and foreine affaires) that no eyres should be holden during two yeers; and after in 16 R. 2. that no eyre should be holden till the next parliament; but thus much in a case so evident shall suffice. We have added thus much, not of curiosity, nor of a spirit of contradiction, but for two respects; the one, that when our historians do meddle with any legall point, or matter concerning the law, we would advise them, that they would before they write, consult with those that be learned, and apprised in the lawes of this realm: the other, that truth might be manifested, and prevail.

But hereof more largely shall be spoken in the treatise concerning the jurisdiction of courts.

STATUT. DE WESTMINSTER 3.

Editum Anno 18 Edw. 1. Ad Parliamentum
post Festum Hil. et Paschæ.

In the Parliament Roll it is intituled,

Statutum Regis de Terris vendendis et emendis.

IT is called the statute of Westm. 3. because two notable parliaments had been before holden at Westminster, the one called Westm. 1. and the other called Westm. 2. In respect whereof, and of the excellencie of it, this parliament being holden at Westminster, is called Westm. 3.

1 part of the Institutes, sect. 140.

CAP. I.

QUIA emptores terrarum (1) et tenementor' de feodis magnatum et aliorum dominorum in præjudicium eorundem, temporibus retroactis, multotiens in feodis suis sunt ingressi, quibus libere tenentes eorundem magnatum et aliorum terras et ten' sua vendiderunt, tenend' infeod' sibi et hæredibus suis de feoffatoribus [et hæredibus] suis, et non de capitalibus dom' feodorum, per quod iidem capitales domini eschaetas, maritagia, et custodias terrarum et tenement' de feodis suis existentium sæpius amiserunt: quod quidem eisdem magnatibus et aliis dominis quam plurimum durum et difficile videbatur, et [sic] in hoc casu exheredatio manifesta. Dominus rex in parlamento suo apud Westmon' post Pasch. anno regni sui 18. videlicet in quindena Sancti Joh. Bapt. ad instantiam magnatum regni sui, concessit, providit, et statuit, quod de cætero liceat unicuique libero homini (4), terras suas, seu tenementa sua, seu partem inde ad voluntatem suam (2) vendere (3), ita tamen quod feoffatus teneat terram illam, seu tenement' illud

FORASMUCH as purchasers of lands and tenements of the fees of great men and other lords, have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors, and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees; which thing seemed very hard and extream unto those lords and other great men, and moreover in this case manifest disinheritance: Our lord the king, in his parliament at Westminster, after Easter, the eighteenth year of his reign, that is to wit, in the quinzime of Saint John Baptist, at the instance of the great men of the realm, granted, provided, and ordained, that from henceforth it shall be lawfull to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands

lud de capitali domino (6) *feodi illius* lands or tenements of the chief lord
 (5) *per eadem servitia et consuetudines* of the same fee, by such service
 (8), *per quæ feoffator suus illa prius* and customs as his feoffor held
tenuit (7).

(1 Roll, 106. Fitz. Avowry, 108. 185. 255. 12 Car. 2. c. 24.)

Lib. 3. fol. 23,
 24. Walkers case.

[501]
 Mag. Chart. c. 32.

31 Aff. p. 30.
 2 E. 3. 33.
 49 E. 3. 10.

(1) *Quia emptores terrarum, &c.*] The cause of the making of this statute, appeareth by the preamble, and by that which hath been said upon the exposition of the 32. chapter of the statute of Magna Charta; where also the principall parts of this act are explained, yet some things are thereunto necessarily to be added.

At the common law, if A. had made a feoffment in fee to B. *reddend' inde, sive tenend' de se et hæredibus suis per G. d. pro omnibus servitiis, et fac' capitalibus dominis feodi pro prædict' A. et hæredibus suis omnia servitia debita, &c.*

In this case by the first *reddend'* or *tenend'* the land had been holden of the feoffor, and all the services due shall be done to him; for to do service for a man, is to do it to him; *qui pro me aliquid facit, mihi fecisse videtur.*

3 Aff. 8. 33 E. 3.
 Annuity 52.
 22 Aff. 53.
 45 E. 3. 15. b.
 4 H. 6. 20.

49 E. 3. 10.

If the tenant had made a feoffment in fee before this statute generally, without reservation of any tenure, the feoffee should have holden of the feoffor, as he had held over; for example, if he had holden by knights service, the feoffee by creation of law had holden by knights service of the feoffor, in respect of the tenure over by him; and therefore if the lord had confirmed the estate of the feoffor, *viz.* the mesne, to hold by fealty onely (which was socage) the tenure between the tenant and the feoffor should be socage also, because the tenure created by law followeth the tenure, in respect whereof it was created.

33 E. 3. Avowry
 255. 4 H. 6. 20.
 12 E. 4. 16.
 Lib. 3. fol. 23.
 Walkers case.

(2) *Quod de cætero liceat unicuique libero homini, terras suas, seu tenementa sua, seu partem inde ad voluntatem suam vendere.*] By the common law, the tenant might have made a feoffment in fee of the whole tenancie to be holden of the chief lord; but notwithstanding the lord might, during the life of the feoffor, take him for his tenant, and avow upon him (in respect of the former fealty, service, and privity) albeit the feoffee gave notice, and tendred him all the arrerages, which now this statute hath altdred.

Mag. Chart.
 c. 32.

See the exposition upon the 32. chapter of Magna Charta.

(3) *Vendere.*] Is here not onely taken for a sale, but for any alienation by gift, feoffment, fine, or otherwise: but sale was the most common assurance.

(4) *Libero homini.*] *i. Libere tenenti;* to every free-holder. Hereby are excluded not onely *nativi*, but also *nativi tenentes*, copy-holders, or tenants at will, according to the custome of the manour.

4 H. 6. 20.
 3 E. 4. 12.

(5) *Ita tamen quod feoffatus teneat terram illam, seu tenementum illud de capitali domino feodi illius.*] The generall words of this act take not away necessary incidents, as that the feoffee of all, or of part, shall give notice, and tender the arrerages before the lord shall be compelled to avow upon him: neither do these, or the former words [*de cætero liceat*] take away the fine for license of alienation, &c. of lands holden of the king *in capite*, for that belongeth to the king by the said statute of Magna Charta. See Magna Charta, cap. 32.

Mag. Chart.
 c. 32.

Thesc.

These generall words have a tacite exception, *viz.* unlesse all the lords mediate and immediate do assent thereunto; for, *quilibet renunciare potest benefic' juris pro se introduct'.*

(6) *Capitalis dominus.*] Is here taken for the next immediate lord, and so by degrees upward to every lord paramount, albeit the act speaketh in the singular number: and it is to be known, that all the lands and tenements in England are holden either mediately or immediately of the king, and therefore he is *summus dominus supra omnes.*

* If the king be lord, A. mesne, C. mesne, and tenant, the tenancie commeth to the hands of the king by forfeiture or conveyance, the king granteth the lands to another in fee [*tenend' de capitali domino per servitia debita, et consueta*] † this grant shall revive not onely the immediate tenure of C. but of A. and of the king also, albeit the *tenend' de capitali domino* be in the singular number (as here the statute speaketh) yet is it as much as *capitalibus dominis.*

(7) *Per eadem servitia et consuetudines, per quæ feoffator suus illa prius tenuit.*] A. holdeth lands by knights service, and giveth the same to B. in tail, to hold of him in socage; B. maketh a feoffment in fee, the feoffee shall not hold of the lord in socage, as the feoffor held, but by knights service, as A. the donor held: for by the feoffment the reversion in fee holden by knights service is drawn out of the donor, and passeth to the feoffee; and the feoffee in this case cannot hold of the donor: and this case is not against the letter of the law, but within the intent and meaning thereof; for the meaning of this law was, that the feoffee should hold of the lord, as the feoffor did when the feoffee held of the same lord; and this act was made for the advantage of the lords; and therefore in construction the feoffee shall hold, not as the feoffor, but as the donor held.

If the husband seised of land in the right of his wife make a feoffment in fee, the feoffee shall hold as the wife held, for the husband had nothing but in her right.

Also if the tenant that holds by priority make a feoffment in fee, the feoffee shall not hold by priority; for this act saith, *per eadem servitia*, by the same services, and not according to every collateral quality.

If tenant in frank almoign alien in fee, that feoffee shall not hold of the lord *per eadem servitia*, albeit he be a man of the church; but he shall hold of the lord by fealty onely: for by the first words of this act he shall hold of the lord, but he cannot hold of the lord *per eadem servitia*, because it is against the nature of the tenure in frank almoign, to hold of any but of the donor or his heirs; and generall words of an act shall not be taken to work any thing against the nature of the thing, or the rule of law; but he shall hold by fealty onely, which was as free a tenure, and as neer to the former, as can be, and therefore by construction [*eadem servitia*] the same services shall be taken as neer the same services as may be.

And this act extendeth to lands holden by fee farm.

(8) *Consuetudines.*] Is here taken for services, as in the writ *de consuetudinibus et servitiis*, and not for customes.

If the mesne release to the tenant, the tenant shall hold *per eadem servitia et consuetudines*, as the mesne did; and so if the tenant

27 H. 8. 26.
2 E. 2. Avowry
183.

* 33 H. 6. 7.
8 E. 3. 283.
17 E. 3. 59.
46 E. 3. Petition
19. lib. 6.
fol. 5, 6.
Sir John Molyns
case. Eodem libr.
fol. 130, 131.
Bewlies case.

† [502]

2 E. 2. Avowry
181. 10 E. 3. 26.
18 E. 3. 7.
31 E. 3. Gard
116. 43 E. 3. 8.
1 H. 5. 5 E. 4. 8.
15 E. 4. 13.
Tr. 18 Eliz. in
communi banco,
in Wyats case,
Per cur' which I
heard and ob-
served.

1. part of the In-
stitutes, sect.
139. Lib. 9. fol.
123. Anth.
Lows case.

45 E. 3. 15. b.
Mag. Chart.
cap. 30. verb.
Consuetud
22 E. 3. Dower
131. 33 Aff. 17.
2 E. 4. 6.
7 E. 4. 12.

tenant infeoffe the mesne, the mesne shall hold *per eadem servitia*, as he did before: and so it is if the tenancie come to the mesnalty by act in law, as by escheat or descent, the mesne shall hold *per eadem servitia consuetudines*, as he held before; for albeit the tenure between the tenant and the mesne in these cases be extinct, yet the feignory paramount, which also was issuing out of the tenancie, remaineth still.

10 Aff. p. 29.
W. 2. cap. 9.
Le case de For-
judger.

If there be lord mesne, mesne, and tenant, and the first mesne dyeth without heir, and the mesnalty escheat to the second mesne; or if the mesne grant the mesnalty to the mesne, the mesnalty that which is neereft to the tenancie doth drown the more remote mesnalty, and the tenant shall hold *per eadem servitia et consuetudines*, as he held before: but the second mesne shall hold of the lord paramount *per eadem servitia et consuetudines*, as he held before the extinguishment of his mesnalty for the cause aforesaid.

[503]

C A P. II.

ET si partem aliquam earundem terrarum, seu tenementorum aliqui vendiderit, feoffatus illam teneat immediate de capitali domino (1), et oneretur statim de servitiis quantum pertineat sive pertinere debet eidem capitali domino pro particula illa (2) secundum quantitatem terræ (3) seu ten' sic vendit'. Et sic in hoc casu decidad capitali domino ipsa pars servitii per manus feoffati capiend', ex quo feoffatus debet eidem capitali domino juxta quantitatem terræ seu ten' venditi, de particula illius servitii sic debiti esse intendens et respondens.

AND if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services, for so much as pertaineth, or ought to pertain to the said chief lord for the same parcel, according to the quantity of the land or tenement so sold. And so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord, according to the quantity of the land or tenement sold for the parcel of the service so due.

(Dyer, 299. Fitz. Avowry, 101. 108. 218. Fitz. Herriot, 1. Bro. Tenures, 2. 65. 6 Rep. r. 8 Rep. 105. 27 H. 8. f. 26. 40 Ed. 3. f. 40.)

29 H. 8. tenures
Br. 64. 17 E. 3.
15.

(1) *Feoffatus ille partem illam teneat immediate de capitali domino pro particula illa.*] [*Particula illa*] is understood of a part in severalty, and not in common, and therefore it is holden that if the tenant make a feoffment in fee of the moiety or third part, &c. of the tenancy, that such a feoffee is not within the purview of this statute; for a moiety or a third part, &c. *pro indiviso* is not *particula*, for that word implieth a part in severalty.

17 E. 3. 15.

And this branch by reason of this word [*feoffatus*] is understood when part of the tenancy *per avails* is aliened, and not when part of the mesnalty.

Lib. 6. f. 1. Bru-
erton's case. Li.
8. fo. 105, 106.

(2) *Pro particula illa.*] Is understood of services divisible and apportionable, and not of entire services, be they annuall or not annuall.

annuall, whereof you shall reade notable matter, when entire services by alienation of part shall be multiplied, and when not, and what services shall be extinct by the purchase of part by the lord, and what remaine, and what shall be apportioned, in Bruertons case in the sixt part of the reports, and in Talbots case in the eight part.

Also when the lord purchaseth part, he shall hold that part *pro particula* of the lord paramount by the purview of this statute.

(3) *Secundum quantitatem terræ.*] The statute doth ordain that the feoffee of part shall hold *pro particula* of the lord, but it is necessary to be known how the same shall be apportioned: for *parum proficit scire quid fieri debet, si non cognoscas, quo modo sit facturum*: therefore admit that there be lord and tenant of twenty acres of land by fealty, and x s. rent, the lord doth purchase two acres, and taking the rent to be apportioned according to the quantity of the land doth distrain for ix s. and the tenant maketh rescous, the lord brings his assise, the tenant pleads *nul tert*, the recognitors of the assise shall extend the land according to the value, and not according to the quantity, and that the lord ought upon the true valuation of the said two acres so purchased to have but viij. s. vi. d.

In this case, albeit the plaintiffe did mistake the just residue upon the apportionment, yet shall he recover so much as is found by the jury to be due; for it were too hard, and a cause of multiplication of suits, and against the meaning of the makers of this act, that the lord should be driven in his assise or avowry, &c. to hit the just summe due upon the apportionment, but though he demand more, yet shall he recover but that just summe which is implied in these words, *secundum quantitatem terræ, i. secundum quantitatem valoris terræ*: but if he demand lesse in that action, he shall not recover the greater.

And so it is, if a man make a lease for yeares reserving a rent, if he graunt away part of the reversion, the rent shall be apportioned by the common law, and albeit the grauntee of part demand or claime more in his action of debt, or avowry then is due, yet shall he recover so much as the jury shall finde upon a just apportionment to be due, against a sudden opinion reported by serjant Bendloes, Hil. 6 & 7 E. 6. that the rent in that case should not be apportioned, but lost; but the law hath been often adjudged to the contrary for foure reasons:

1. For that it is a rent service, and not a bare contract, and rent services were apportionable at the common law.

2. It is incident to the reversion, which is severable, *et accessorium sequitur naturam sui principalis*.

3. The rent, being a rent service, is severable by recovery of part; in an action of waste, or upon surrender in part.

4. Lastly, it is a generall case, and specially in case of wils, which many times are void for a third part.

And where the case hath been put of a lessee for yeares, the same law holdeth in the case of a lease for life, whereupon a rent is reserved, for the apportionment of the rent, whereby it appeareth; that there was an apportionment at the common law, *pro particula secundum quantitatem valoris*, &c. for to none of these cases our act doth extend unto.

Talbots case.
First part of the
Institut. § 222:
verbo annuall.
Whereunto you
may adde for
the case of suit-
service. Mich.
18 E. 1. in Banco
Rot. 232. Ro.
Lutterels case.
12 E. 4. 16.
6 H. 7. 7.

Regula.

18 E. 2. avowry
218. 4 Aff. 5.
12 E. 4. 16.
Pl. Com. 82.

[504]

Pasch. 39 El.
Rot. 233. coram
Rege inter Col-
lins & Harding.
Hil. 42. El. in
Communi Ban-
co. int' Ewer
& Moile. Tr. 43.
El. in Communi
Banco. Rot. 243.

CAP. III.

ET sciendum est quod per prædictas venditiones seu emptiones terrarum seu ten', aut partis alicujus earundem nullo modo possunt terræ seu ten' illa in parte vel in toto ad manum mortuam devenire, arte vel ingenio, contra formam statuti super hoc dudum editi (1). Et sciendum est quod istud statut' tenet locum de terris venditis tenend' in feodo simplici (2) tantum. Et quod se extendit ad tempus futurum. Et incipiet locum tenere ad festum Sancti Andree apostoli proxim' futur' anno regni regis E. filii regis H. xviii.

AND it is to be understood, that by the said sales or purchases of lands or tenements, or any parcels of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy ne craft, contrary to the form of the statute made thereupon of late. And it is to wit, that this statute extendeth but only to lands holden in fee-simple; and that it extendeth to the time coming, and it shall begin to take effect at the feast of Saint Andrew the apostle next coming. Given the eighteenth year of the reign of king Edward, son to king Henry.

(9 H. 3. stat. 1. c. 32.)

(1) *Ad manum mortuam devenire, arte vel ingenio, contra formam statuti super hoc dudum editi.*] This is understood of the statute de 7 E. 1. de religiosis, and by this branch that act is in no sort impeached by this, but standeth in full force: and note the manner of saving of former statutes in auncient times by generall words, which is the surest way.

(2) *In feodo simplici.* And therefore if tenant for life graunt his estate in severall parts to severall persons, yet may the lessor distrain for the whole * rent in every part, for this act extendeth onely to tenants in fee-simple.

But yet tenant for life, and tenant in taile are not wholly excluded by force of these words [*in feodo simplici*] out of this statute, for where the whole fee-simple passeth out of the feoffor, there this act extendeth to estates for life and in taile; as if an estate for life or in taile be made of land, the remainder in fee, there then tenant for life or in taile shall hold *de capitali domino* by force of this act, but otherwise it is when a reversion remaineth in the donor or lessor.

For if a man at this day make a gift in taile, *tenend' de capitalibus dominis feodi*, &c. these words are void, and he shall hold of the donor:

22 Aff. 42.

3 Aff. 18. 4 H.

6. 20. 11 H. 8.

88. Kelwey.

* [505]

1 E. 3. 3. 4 H. 6.

20. 21. 22.

20 E. 3.

avowry 131.

20 E. 3. ubi supra.

38 E. 3. 7.

4 H. 6. 20.

21. &c.

Lib. 2. fo. 92.

Binghams case.

Lib. 3. fol. 8.

Heydens case.

STATUTUM DE JUDAISMO.

Ad Parliamentum tentum post Festum Sancti Hilarii, et post Pasch', anno 18 E. 1.

PUR ceo que le roy ad vieu que mults des males et disherisons des probes homes de sa terre sont venus per les usurers que les Jewes ont fait en arere, et que mults des peches ent ount furs de ceo, mesque luy et ses aunc' eyent ent grand pren de la Jewrie tout en ceo en arere, ment pur quant en le honor de Dieu et pur le common pren del people ordein le roy et establie que nul Jew desormes ne prist rien a usury sur les terres reuts ne sur autres choses, et que nul usury ne curge * de S. Edward prochainement passe en avant, mes que les covenants avant faits soient tenus save que les usurers mes cessent †.

* That is from the feast of S. Edw. next before passed, which is the 18 day of March.

By the preamble hereof, two great mischiefs did follow before the making of this statute upon Jewish usury; now the difficulty was how the same should be remedied. The mischiefs were these:

1. The evils and disherisons of the good men of the land.
2. That many of the sins or offences of the realme had risen and been committed by reason thereof, to the great dishonor of Almighty God.

The difficulty how to apply a remedy, was, considering what great yearly revenue the king had by the usury of the Jewes, and how necessary it was that the king should bee supplied with treasure; what benefit the crowne had before the making of this act appeareth by former records; as take one for many: from the 17 of December in the 50 yeare of H. 3. untill the Tuesday in shrovetide the second yeare of Edward the first, which was about seaven yeares, the crowne had foure hundred and twenty thousand pounds fiftene shillings and foure pence *de exitibus Judaisini*; at what time the ounce of silver was but xx d. and now it is more then treble so much, so as the recital of the preamble is true, *Mesque luy et ses auncestres eyent ent grand pren de la Jewrie*.

Many provisions were made both by this king and others, some time they were banished, but their cruell usury continued; and soon after they returned, and for respect of lucre and gain, king John in the second yeer of his reign granted unto them large li-

3 I 2

berties

Rot. Patent anno 3 E. 1. m. 14. 17. 26. William Middleton redit. compozum.

[507]

Tempore R. 1. Vet. Mag. Chart. fol. 144. Rot. Chart. 2 Joh. nu. 49. 53. 131.

† [This appears to be little more than the preamble of the statute entitled "Statutum de Judaismo," which is given at length in the book quoted by lord Coke in the margin, Vet. Mag. Chart. from whence it is transcribed in the appendix to Ruffhead's statutes among those of uncertaine time.]

3. Dorf. clauf.
m. 27. Dorf. Pat.
55 H. 3. m. 10.

berties and priviledges, whereby the mifchiefs rehearfed in this act without meafure multiplied.

Rot. 2 E. 1. m. 1.
3. 5. Rot. clauf.
3 E. 1. m. 8. 10.
13. 16. 23. Rot.
Pat. 3 E. 1. m.
36. & 17. Dorf.
clauf. 7 E. 1. m. 6.

Our noble king Edw. 1. and his father H. 3. before him, fought by divers acts and ordinances to ufe fome mean and moderation herein, but in the end it was found, that there was no mean in mifchief, and as Seneca faith, *Res profecto ftulta eft nequitie modus*. And therefore king E. 1. as this act faith, in the honour of God, and for the common profit of his people, without all refpect (in refpect of thefe) of the filling of his own coffers, did ordain, that no Jew from thenceforth fhould make any bargain, or contract for ufury, nor upon any former contract fhould take any ufury, from the feaft of Saint Edward then laft paft; fo in effect all Jewifh ufury was forbidden.

Matth. Paris;
pag. 833.

The king of France, anno Domini 1253. 37 H. 3. banifhed out of France all the Jews perpetually, faving merchants, and fuch as fhould get their living by the work of their hands; but foon after they returned again.

This law ftruck at the root of this peftilent weed, for hereby ufury it felf was forbidden; and thereupon the cruell Jews thirfting after wicked gain, to the number of 15060, departed out of this realm into foreign parts, where they might ufe their Jewifh trade of ufury, and from that time that ration never returned again into this realm.

Holl. fol. 285.
Walf. hypod. 72.
Florilegus Cron.
Dunftable.
Banifh the trade,
and banifh the
tradefman.
Divers kings had
banifhed the
Jews, and yet
they returned,
but no king ba-
nifhed their
ufury before.

Some are of opinion, (and fo it is faid in fome of our histories) that it was decreed by authority of parliament, that the ufurious Jews fhould be banifhed out of the realm; but the truth is, that their ufury was banifhed by this act of parliament, and that was the caufe that they banifhed themfelves into foreign countries, where they might live by their ufury; and for that they were odious both to God and man, that they might paffe out of the realm in fafety, they made petition to the king, that a certain day might be prefixed to them to depart the realm, to the end that they might have the kings writ to his fherifes for their fafe conduct, and that no injury, moleftation, damage, or grievance be offered to them in the mean time: one of which writs we will tranfcribe:

Rot. clauf. 18 E.
1. m. 6. 18 Julii.
The like writs
to other coun-
ties, and intitu-
led, *De Judæis
regni Angliæ ex-
euntibus*.
* Nota.

*Rex vic. G. Cum Judæis regni noſtri univerſis certum tempus pre-
fixerimus a regno illo tranſfretandi, nolentes quod iſſi per miniſtros noſtros,
aut alios quocunq; aliter quam fieri conſuevit, indebite pertreſcentur:
tibi præcipimus quod per totam baliivam tuam publice proclamari, et fir-
miter inhiberi facias, ne quis eis infra tempus prædictum, injuriam,
moleſtiam, damnum inferat, ſeu gravamen. Et cum contingat ipſos cum
catallis ſuis, * quæ eis conceſſimus, verſus partes London, cauſa tranſfre-
tationis ſuæ, dirigere grefſus ſuos, ſalvum et ſecurum conductum eis
habere facias ſumptibus eorundem. Proviſo quod Judæi prædicti ante
receſſum ſuum vadium chriſtianorum quæ penes ſe habent, illis quorum
fuerint, ſi ea acquietare voluerint, reſtituant, ut tenentur. Teſte rege
apud Weſtm. 18 die Julii, anno 18 E. 1.*

Parliam. 18 E. 1.
poſt feſtum Hil.
& Paſch. at
which parlia-
ment the ſtat. of
W. 3. *de quia
emptores terra-
rum* was made.

This ſtatute *de Judaismo* was made at the parliament *poſt feſtum Hilarii*, anno 18 E. 1. At which parliament the king had a fifteenth granted to him *pro expulſione Judæorum*. And this writ was granted in July following, the king beginning his reign, Novemb. 16. for the parliament knew, that by banifhing of ufury, the Jews would not remain. And thus this noble king by this means banifhed for ever theſe infidell ufurious Jews; the number of which Jews thus banifhed, was fifteen thouſand and threeſcore.

But

But lucre and gain, which king John had, and expected of the infidell Jews, made him *impie judaizare*; for to the end they should exercise the laws of their sacrifices, (which they could not do without a priesthood) the king by his charter granted them to have one, &c. which, for the great rarity thereof, and for that we finde it not either in our books, or histories, that we remember, we will rehearse in *hæc verba*:

*Rex omnibus fidelibus suis, et omnibus, et Judæis, et Anglis salutem. Sciatis nos concessisse, et præsentī charta nostra confirmasse Jacobo Judæo de Londoniis presbytero Judæorum presbyteratum omnium Judæorum totius Angliæ. Habendum et tenendum, quam diu vixerit, libere et quiete, et honorifice et integre, ita quod nemo ei super hoc molestiam aliquam, aut gravamen inferre præsumat. Quare volumus et firmiter præcipimus, quod eidem Jacobo, quoad vixerit, presbyteratum Judæorum per totam Angliam garantetis, manuteneatis, et pacifice defendatis. Et si quis ei super eo forisfacere præsumperit, id ei sine dilatione (salva nobis emenda nostra) de forisfactura nostra emendari faciat tanquam dominico Judæo nostro, quem specialiter in servitio nostro retinuimus. Prohibemus etiam ne de aliquo ad se pertinente ponatur in placitum, nisi coram nobis aut coram capitali iusticiario nostro, sicut charta regis Richardi fratris nostri testatur. Teste S. Bathoniensi episcopo, &c. Dat' per manus * H. Cantuariensis archiepiscopi cancellarii nostri apud Rotbomagum 31 die Julii, anno regni nostri primo.*

Walter archbishop of Canterbury, and chancelor of England, born in Westdereham in Norfolk, and brought up by Ranulph de Glanville chief justice of England, founded the monastery of Westdereham, *premonstratensis ordinis*. Vide *Lib. de antiquitate Britannicæ ecclesiæ*, cap. 42. Hubertus p. 134. worthy to be read and observed.

At this parliament also of this noble king E. 1. in the 18 year of his reign, another kinde of Jews were severely punished, *viz.* the judges of the kings bench, and of the common pleas, the barons of the exchequer, and the justices itinerants, except two, whom for their honour we will name (*in memoria æterna erit iustus*) *viz.* Sir John of Metingham chief justice of the common pleas, and Elias de Bekingham one of his companions, [*qui positi fuerunt in fornace, et prodierunt aurum*:] for they had dealt uprightly in their places, and had never stained their hands with sordid bribery. But let us return to our naturall Jews.

The richest of these soon after this parliament, by force of the kings writ having imbarked themselves with their treasure in a tall ship of great burthen, when the ship was under sail, and gotten down the Thames towards the mouth of the river beyond Quinborough, the master of the ship confederating with some of the mariners, invented a stratagem to destroy them, and to bring the same to passe, commanded to cast anchor, and rode at the same till the ship at an ebbe lay on the dry sands; the master and his confederates, in further execution of their wicked plot, moved and inticed those rich Jews to walk with the master on land, for their recreation and preservation of health, which they did: at last, when the master understood the tide to be coming in, he stole away from them, and got him back to the ship, whither he was, as it was before plotted, drawn up by a cord; the Jews made not so much haste as he did, because they knew not the danger, but when they perceived in what perill they were in (that had shewed

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Rot. Chart. 1.
Regis Johan.
part. 1. m. 28.
Chart. 171. This king had a most troublesome and dishonorable reign, God raising against him for his just punishment two potent enemies, Pope Innocent the 3. and Philip king of France. And besides (which was the worst) he lost the hearts and love of his baronage and subjects, and at the last had a fearful end.
* H. id est, Huberti.

no mercie to numbers that cryed to them) cryed to him for help: his wicked and prophane answer to them was, that they ought rather to cry to Moses, by whose conduct their fathers passed through the Red Sea, and that he was able to deliver them out of those raging floods which now came in upon them: and within a a short space swallowed up them all: the master, and such other as were consenting to this foul fact, were before the justices itinerants indicted, convicted of murther, and hanged.

Chron. de Dun-
stable & Vet.
Manufer. Itiner.
Kanc. coram.
Justic. Itiner.
an. 18 E. 1.

And hereby it appeareth, that divine ultion did follow these cruell Jews, wicked and wretched men; for the debts of cruelty are seldom unpaid.

We will here adde a record de Priore de Bridlington, the information or charge is not in the record, this onely we finde:

[509]
Pl. Parlam. post
Pasch. apud
London.
21 E. 1. Rot. 4.
* Note a good
exposition upon
this statute.

*Et quia prædictus prior cognoscit quod prædicta pecunia præd' Judæo debebatur, viz. 300 l. nec ei solvebatur ante exilium Judæorum, & * quicquid remansit de eorum debitis, aut catallis in regno post eorum exilium domino regi fuit; consideratum est quod dominus rex recuperet pecuniam præd', & dictum est eidem priori quod non exeat villa antequam domino regi de præd' pecunia satisfaciatur. Et respondeat Johannes archiepiscopus Eborum, quia præcepit dicto priori solvere valet' sus prædictam pecuniam in deceptionem regis, contra * sacramentum & fidelitatem suam domino regi datam, &c. Idem in alio Rot. anno 22 E. 1. Rot. 5.*

What offence it
is to deceive the
king of any of
his forfeitures.
* For in doing
of his fealty he
is sworn.

The archbishop confessing the same, was adjudged to be in misericordia regis, sed idem dominus rex reservat sibi ipsi taxationem misericordie.

This light touch we have given to this branch of this act, to the end it may be a precedent and pattern in like cases to apply the like remedy, and will leave the reader to peruse the residue of this act, which is worthy to be read, and needeth not any exposition.

[510] MODUS LEVANDI FINES,

Editum Anno 18 Edw. I.

QUANT le briefs original soit lie en presence des parties devant justices, donques dira un countour (1) assent: Sir justice, conge d'accord? (2): le justice dirra, que dirra? (3) Sir Robert, et nomena un des parties. Donques quant ils serront agreee de la somme de pecune (4) que est done al roy, donques dirra le justice, Cries la peace (5).

Et

WHEN the writ original is delivered in presence of the parties before justices, a pleader shall say this, Sir justice, conge, de accorder; and the justice shall say to him, What saith sir R. and shall name one of the parties. Then, when they be agreed of the sum of money that must be given to the king, then the justice shall

*Et puis dirra le countour, Issint que la peuce est tiell, a vous conge, que William et Alice sa feme, que cy sont, recognifont (7) le mannour de B. ove les appurtenances (8) contenus en le brieve (6), estre droit du R. come cell' que il ad de leur done, A. aver et tener a luy et a ses heires, de W. et Alice, et les heires A. come en demesne, rent, seignories, courts, plees (9), purchases, gardes, mariages, relieves, escheats, molins, avowsons de esglises, et tous auters franchises, et franke customes al avantdits manours appartenant, rendant per a N. et ses heires, chiefes seignours de fee, service due, et customes pur tous services. Et fait assavoir, que order de ley ne suffre mye, que final accorde soit leve en la court le roy (10) sans brieve original (11), et ceo a tout le mains devant iv. justices en bank (12), ou en eyre, et non pas aillours (13), et en presence des parties nommes en brieve (14), queux soient de pleine age, et de bone memorie, et hors de prison. Et si feme covert de baron soit un des parties, donques covient que el soit primerment confesse de iv. justices avantdits (15). Et si el nassent al fine, ne ceo livermie (16). Et la cause pur que tiel solemnite doit estre fait en cel fine est, pur ceo que fine est ci hault barre, et de ci grand force, et de ci puissant nature en soy, que el forclos nemy seulement ceux queux sont parties et privies (20) a la fine, et leur heires (19), mes tous auters gentes de mound' (21), queux sont de pleine age, hors de prison (17), et de bone memorie, et deins les iv. meres, le jour del fine levie (22), s'ils ne mettront * leur claime (23) de leur action pur le pays, deins lan et le jour (18).*

* [511]

shall say, Cry the peace. And after the pleader shall say, In so much as peace is licensed thus unto you W. S. and A. his wife, that here be, do acknowledge the manor of B. with the appurtenances contained in the writ to be the right of our lord the king, which he hath of their gift, to have and to hold to him and his heirs, of the said W. and A. and the heirs of A. as in demesne, rents, seignories, courts, pleas, purchases; wards, marriages, reliefs, escheats, mills; advowsons of churches, and all other franchises and free customs to the said manor belonging, paying yearly to R. and his heirs, as chief lords of the fee, the services and customs due for all services. And it is to be noted, that the order of the law will not suffer a final accord to be levied in the king's court without a writ original, and that must be at the least before four justices in the bench, or in eyre, and not otherwise and in presence of the parties named in the writ, which must be of full age, of good memory, and out of prison. And if a woman covert be one of the parties, then she must be first examined by four of the said justices; and if she doth not assent thereunto, the fine shall not be levied. And the cause wherefore such solemnity ought to be done in a fine, is, because a fine is so high a bar, of so great force, and of so strong nature in itself, that it concludeth not only such as be parties and privies thereto, and their heirs, but all other people of the world, being of full age, out of prison, of good memory, and within the four seas, the day of the fine levied, if they make not their claim of their action within a year and a day by the country.

(5 Rep. 39. Rast. 349. 27 Ed. 1. stat. 1. c. 1. 1 R. 3. c. 7. 4 H. 7. c. 24. 4 Rep. 125. 4 Ed. 3. c. 46. 15 Ed. 2. stat. of Carlisle.)

Pl. Com. 368. a.
Glanv. li. 8. ca.
1, 2, &c. Bract.
lib. 5. fo. 435.
lib. 3. f. 106. li.
4. fo. 256.
Brit. f. 91 & 216.
Fleta, l. 6. c. 52.
Lib. 2. ca. 12.
Lib. 5. fo. 38.
Teyes case.

Li. 4 f. 125.
Beverlies case.
* Int' placita de
Parliam. apud
Atheridge, anno
19 E. 1. Rot. 12.
The case of
Margery, late
the wife of Th.
Weyland.

27 E 1. c. 1. acc'.
First part of the
Inst. sect. 441.
Dier 12 El. 291.
Pl. Com. 254.
Stowels case.
& 432.
Stapletons case.
Li. 6. fo. 38, 39.
Teyes case.

For the antiquitie of fines, it is certaine that they were frequent before the conquest.

For what end and purpose fines, or a finall concord were first instituted, and wherefore it is called *finis*, it appeareth in the said auncient authors, *ubi supra*, which wrote before this act, * and by others, and further by an auncient record of parliament, anno 19 E. 1. in these words, *Nec in regno isto provideatur vel sit aliqua securitas major vel solemnior, per quam aliquis statum certiores habere possit, vel ad statum suum verificandum aliquod solemnius testimonium producere, quam finem in curia domini regis levatum, qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet.* See the record, for it is notable.

For the hautesse and puissant force and nature of a fine, somewhat shall be said hereafter in this chapter, in the meane time the true pleading of a fine is not, that *I. S. levavit quendam finem, sed quod. quidam finis se levavit, &c.* without alledging of any feason.

For the parts of a fine, see Teyes case, lib. 6.

(1) *Un counour.*] That is to say, a serjant, as before it hath been said.

(2) *Conge d'accorder.*] *i. Licentia concordandi.*

For this license a fine is due to the king, which is called *finis pro licentia concordandi*. And the reason that this fine is taken, is for that the king loseth by reason of this concord the fines or amer-ciements, which should have beene due to him upon the judgement or non-suit, and other advantages.

This fine *pro licentia concordandi* is an auncient flower of the crown, and is called the kings silver, and the post fine, and it is called the post fine in respect of the primer fine, or the fine in the Hamper; for in every reall action of lands or tenements of the yearly value of 5 marks, there is due in the Hamper upon the originall vi. s. viij. d. *viz.* for every v. marks of land vi. s. viij. d. and if it be under v. marks, no fine in the Hamper upon the originall is due: a writ of covenant to levy a fine (whereupon fines in these dayes are usually levied) is holden a reall writ, for which a fine in the Hamper is paid. Now the fine *pro licentia concordandi*, or the post fine is also certain, for it is as much as the primer fine, and halfe as much more. As for example (*quia exempla illustrent*) a writ of covenant is brought to levie a fine of land, of the yearly value of v. marks, there is vi. s. viij. d. due presently for the primer fine, or fine in the Hamper, but the fine *pro licentia concordandi*, or the post fine is not due till *conge d'accorder* be graunted by the court, in this case the post fine is x. s. that is as much, and halfe as much as the primer fine was, but if the land be under v. marks, so as no primer fine is due, yet shall there be a fine *per conge d'accorder*, and that is also certain, *viz.* vi. s. viij. d.

And note there is no post fine due, but when there is *conge d'accorder*, and in the court of common pleas there is a speciall clerk for the entring of the kings silver in a roll, which is also endorfed upon the writ of covenant.

And these fines *pro licentia concordandi* are not against *Magna Charta*, c. 29. for it is an auncient revenue of the crown.

And the post fine is paid (as here it appeareth) for the concord, for that is the foundation and substance of the fine, for after that, and

Dier 5 El. 220. b.
Lib. 5. fol. 39.
Teyes case.

and the kings silver entred, though the conusor dieth, the fine is good, and the land passeth, but if the kings silver be not entred, the fine may be reversed in a writ of error.

If a man bring two originall writs of covenant, the one for land in Suff. of the yearly value of vi.l. and another in Essex of xxiv.l. and albeit there be two originals, yet there is but one concord, and for that concord one entire fine is due and not severall.

(3) *Que donera.*] The printed bookes are faulty, for they be *que dirra*: which should be *que donera*, that who is the conusee, that he may give it, and the serjant nameth him.

[512]
6 Eliz. Dier 227.

Lib. 5. fo. 39.
Teyes case.

Now the conusee doth pay the fine, *pur licence daccorder*, as here it appeareth, and if there be more then one in the fine, then he, in whom the fee reposeth by the fine, prayeth the same.

And this fine *pur conge daccorder* doe belong to the king in so high degree of his prerogative, that they passe not by his generall graunt of all fines, albeit the grant be *ex certa scientia, speciali gratia, et mero motu, &c.*

(4) *Quant ils font agreee del somme de pecunie.*] Which is easily done, for the fine upon a just computation of the primer fine, is, as is aforesaid, certaine.

(5) *Cries la peace.*] Some hath it, *Treates le peace*, that is, drawn the peace: here peace is taken for the concord, and the serjant shall say, *Le peace est tiel ove vostre conge.*

(6) *Que William et Alice sa feme, que cy font, recognifont le mannor de B. ove les appartenances, &c.*] Here it appeareth that they which levy the fine ought to doe it in person, and in open court expressed in these words [*que cy font*]; and the reason thereof was, that the judges in open court might upon the view, and other good meanes discern of their age, ideocy, *non compos mentis*, and coverture, and whether those that appeare were the same persons, all which might better be discerned in open court, and the judges informed of the truth thereof, where some people of most of the parts of the kingdome are many times present, and men will be more fearfull to offer any thing that is unjust in open court (which is the publike seat of justice) then in a private chamber, and this was in respect of the hautesse and puissant force and nature of a fine.

But this is altered by a later statute, whereby it is provided, that if any person aged or decrepit, impotent, or by casualty be so oppressed or holden, that by no meanes he is able to come before the justices in court, that in such case two or one of the justices, by assent of the residue of the bench, shall visit the party so diseased, and shall receive his conusance upon the plea, and forme of the plea, that he hath in court, whereupon the same fine ought to be levied; and if there goe but one, he shall take with him an abbot, a prior, or a knight of good fame and credence; and hereof the writ of *dedimus potestatem* had his beginning, and at the first was not graunted, but where the party was so aged, decrepit, or impotent, as he could not come to the court, and accordingly the writ of *dedimus potestatem* was framed, *ac præfatus A. adeo impotens existat quod absque maximo sui corporis periculo usq; ad Westm' ad diem in brevi prædicti content' ad recognitionem quod in hac parte requiritur faciend'*

Stat. de Carlile.
15 E. 2.

Vet. N.B. f. 103.
Br. tit. fines 120.

1 H. 7. 9. a.
[513]

41 E. 3. 14.
21 E. 4. 4.

50 E. 3. 9. 28 E.
3. 95. 44 Aff. 36.
21 E. 3. fines 23.
7 H. 4. 16.
1 H. 7. 12. 22,
23, &c.
31 E. 1. grant 90.
7 E. 3. 14. 24 E.
3. 26. 39 E. 3. 1.
50 E. 3. fines 1.
Glan. l. 8. ca. 3.

Glan. l. 8. ca. 1.

13 E. 1. attain
71. 2 E. 3. 19.
21 E. 3. 44.
32 E. 3. Scire
fac' in ration.
divisio. 50 E. 3.
23. 4 E. 4. 2.
18 E. 4. 22.
19 E. 4. 23.
21 E. 4. 4.
17 E. 3. fo. 31.
21 E. 3. 20.
44 E. 3. 7 H. 4.
44. 8 H. 4. 23.
8 E. 4. 6.

faciend' laborare non sufficit; which forme albeit it continueth to this day, yet is the conusans taken of them that be in health, and able to travell. And where that act speaketh of a justice, a *dedimus potestatem* is graunted to a serjant at law, sworn to the king, as common experience teacheth; and the chief justice of the court of common pleas may take a conusans of a fine, *virtute officii sui*, without any writ of *dedimus potestatem*.

Here is a forme of the most principall fine, *viz.* the fine *sur conu-
sance de droit come ceo que il ad de son done*.

It is to be known that there are two kinds of fines, *viz.* one executed, and the other executory. Executed, that is, where the present estate passeth unto, or is supposed in the conusee, for such a fine is a feoffment of record, as this fine *come ceo*, or *sur releas*, or confirmation, or *sur surrender*.

Executory, as when no estate is vested in the conusee untill it be executed by entry or action, as fines *sur graunt et render* by the conusee, which must be made upon a fine *come ceo*, or *sur releas*, &c. or other fine which is executed, or otherwise the conusee could not make any graunt and render of that land, &c. which he had not; more shall be said hereof in the exposition upon the statute of 27. E. 1. *de finibus*.

(7) *Recognisunt*, &c.] *Recognoverunt* is the auncient and usuall word in a fine for the conveyance of lands, &c. and very apt, for it is made a plea of land depending when either the demandant or tenant doth acknowledge the land to be the right of the other *per amicabilem compositionem, et finalem concordiam*, as Glanvill saith.

The agreement of the parties have altered the forme of the conusans here expressed, and doe adde, *et illud remisit et quietum clamavit*, &c. Also the fine *sur conusans de droit come ceo*, doth now comprehend a clause of warranty, which is here omitted.

(8) *Le mannor de B. ove les appartenances*.] Of what hereditaments a fine may be levied? Regularly it may be levied of any thing whereof a *præcipe quod reddat* doth lie, as of land, rent, &c. or whereof a *præcipe quod faciat*, as the writ of customes and services, or whereof a *præcipe quod permittat*, as to have common a way, &c. or to be short, whereof a *præcipe quod teneat* doth lie, as the writ of covenant to levy a fine and the like. But of ancient times fines were levied of other things, then will be at this day allowed, and yet those ancient fines shall be holden now as available, as they were taken to be when they were levied.

A fine cannot be levied of a mannor, or lands, that is ancient demesne, for that should be a wrong to the lord of whom the land is holden, for by the fine it should become frank fee, and not impleadable in his court, &c. and if any such fine be levied, the lord shall reverse the same in a writ of deceit; for *res inter alios acta alteri nocere non debet*.

(9) *Come in demesne, rents, seigniories, courts, pleas, &c.*] At the time of the making of this act, the forme was to enumerate in general whereof the mannor consisted, but that forme is now also altered, and that clause wholly omitted at this day.

(10) *Le ordre del ley ne fust my que finall concord soit levy en la court le roy sans briefe originall*.] Hereby it appeareth that this act is a declaration of the common law, and the ignorance or error of some judges was the cause of declaring of the law herein.

First, if there be no originall writ, yet the fine is not void, but voidable by law, and therefore the act saith [*Le ordre del ley ne suffer*] and that is by writ of error, and that holdeth also when there is an originall writ and the fine is levied as well of that which is contained in the writ, as of some other thing not contained: as if the writ of covenant be of the mannor of D. and the fine is of the mannor of D. and likewise of the mannor of S. it is voidable for the mannor of S. by writ of error. It holdeth also when the fine is levied immediately to a person not named in the writ of covenant; as if A. be plaintiffe in the writ of covenant against C. and C. levieth the fine to A. and B. it is voidable by writ of error, but the learning must be further expressed.

For as concerning the thing whereof the fine is levied, it is to be knowne that in case of a fine *sur grant et render*, which containeth a double fine, there is a great diversity between the fine *sur consans de droit come ceo*, &c. for that must be levied of the land, &c. in the originall, but the grant and render may be of another thing then is expressed in the originall: as A. bringeth a writ of covenant against B. for the mannor of D. B. cannot levie a fine to A. of a rent to be issuing out of the mannor of D. but he must levie the fine of the mannor of D. according to the writ, and his covenant therein expressed, but A. may grant and render to B. a rent out of the same mannor contained in the fine, but not out of any other land, neither can the grant and render be of any thing collateral to the land, &c. contained in the writ, or of another nature, and neither issuing out of, nor incident to the land, &c. contained in the originall.

If two doe levy the fine, the graunt and render may bee to one of them.

As concerning the persons to be named in the fine, the fine *sur consans de droit come ceo*, &c. cannot be levied to any person that is not party to the writ of covenant, neither can the grant and render of the land, &c. be immediately *in primo gradu* to any that is no party to the writ, but mediately or in *2 gradu*, &c. it may: for example, if a writ of covenant be brought by A. against B. of the mannor of D. B. levy a fine to A. *come ceo*, A. may grant and render the same to B. for life, or in taile, the remainder to F. in fee; for albeit the writ of covenant be *inter A. querent' et B. deforc'*, so as F. is a meere stranger to the writ, yet seeing he taketh it by way of remainder depending upon an estate warranted by the fine, it hath been allowed in our books, and hath been compared to a deed indented betweene A. and B. whereby A. doth give lands to B. to have and to hold to B. for life, or in taile, the remainder to C. (who is a stranger to the deed) in fee.

(11) *Briefe originall.*] It is not said, *briefe originall enter les parties*, but generally, and therefore a fine may be levied by a vowchee to the demandant, or by the demandant to him, and so likewise by tenant by receipt to the demandant, or by the demandant to him, and yet they are not parties to the writ.

In ancient times fines were levied upon originals that were mixt, as in the assise of *darrein presentment*, *quare impedit*, or the like, which later times have thought to be against the height and force of a fine. For the forme of the originall writ it is to be observed, that if a fine be levied of eight severall things, as of a mannor, a rectory, a house, &c. after the naming of the mannor, the forme is,

7 E. 3. 64. 24 E.
3. 28. 18 E. 4. 22.
19 E. 2. 2. Li. 3.
fo. 5. Owen &
Morgans case.

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10 E. 3. 35. 54.
18 E. 3. 9. 19 E.
3. Abbot 13. 20
E. 3. bre. 686.
26 Aff. 37. 29 E.
3. 3. 38 E. 3. 17.
18 E. 4. 22.
19 E. 4. 2. 3.
21 E. 4. 4. b.

24 E. 3. 35.

6 E. 2. fines 117.
7 E. 3. 37. 64.
10 E. 3. 32.
16 E. 3. fines 8.
18 H. 7. fines
Br. 111. 30 H. 8.
Bro. fines 108.

18 E. 3. 12.
8 H. 4. 5.
21 E. 4. 4.
5 H. 7. 41.

2 E. 3. 19. 10 E.
3. 5. 18 E. 4. 22.
19 E. 4. 2. 3.
21 E. 4. 4. b.
See 27 E. 1. ca. 1.

ac de rectoria, necnon de messuagio; for the fourth, *ac etiam*; for the fifth, *præterea*; for the sixth, *ac ulterius*; for the seventh, *ac etiam*; for the eighth, *ac insuper*: and if there be more, then to begin again: and I have known a chirografe of a fine discovered of forgery by not observing this order.

27 E. 1. c. 1.
4 H. 7. c. 24.
32 H. 8. c. 36.

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1 H. 7. 10, 11.
per les justices.

50 Aff. p. 9.
44 E. 3. 38.
31 H. 8. Fines
Bro. 110.

24 E. 3. 62.
42 E. 3. 37.
46 Ed. 3. 15.
3 H. 6. 4.
8 H. 6. 4.

25 E. 3. 44. 4 E.
3. 41. 5 E. 3. 24.
6 E. 3. 22. 10 E.
3. 26. 18 E. 2.
Fines 121. 4 E.
3. ibid. 43.
16 E. 3. ibid. 6.

25 E. 3. 44.

45 E. 3. tit. Exa-
mination 22.

(12) *Et ceo a tout le meyns devant 4. justices en banke.*] The statute of 27 E. 1. saith, *quia fines in curia nostra levati, &c.* and by the statute of 4 H. 7. it is provided that after the engrossing of every fine to bee levied, &c. in the kings court, before his justices of the common pleas, &c. so as the number of justices here mentioned are not requisite at this day: but before the making of this statute, the justices before whom the fine was levied, were named in the fine and specially upon the making of this act, to the end the number of the justices might appear; for though the number of four be not required, yet there must be above the number of one. And this is the reason that a fine levied *coram Thom. Brian milite, et sociis suis iudiciariis de communi banco*, were not good; because no other judge of that court was named but one, and before one a fine cannot be levied in respect of the solemnity thereof. But many writs that come out of the chancery, are *coram Thoma Brian et sociis suis*.

(13) *Et non pas ailours.*] A fine cannot be levied, to have the force of a final concord by any that hath power *tenere placita*, but onely before the justices of the court of common pleas, or before justices in eyre (whiles they flood) *et non pas ailours*, saith this act: and therefore the king cannot grant power to hold plea for the levying of fines, against this negative statute.

(14) *Et en presence des parties nosmes en le briefe.*] The vouchee and tenant by receipt are not named in the writ, and yet they may (as hath been said) levie a fine to the demandant, or the demandant to them; and these words being in the affirmative do not restrain them.

(15) *Et si feme covert de baron soit un des parties, donques covient que el soit primerment confesse devant iv. justices avantidits.*] This must be understood where the husband and wife do levie a fine, for there she ought to be examined; but where the husband and wife do take by a fine, and depart with nothing, there the feme covert is not to be examined.

If a fine be levied of land to the husband and wife, and the husband and wife grant and render the land, there the wife shall be examined, and the examination must ever be upon the writ; and therefore a baron and feme upon a fine levied to them of land cannot grant and render a rent out of the land, because that rent is not contained in the writ.

The examination must be solely and secretly, and the effect thereof is, whether she be content of her own free good will, without any menace or threat to levie a fine of these parcels, and name them unto her, every thing distinctly contained in the writ, so as she perfectly understand what she doth; and if the judge doubteth of her age, he may examine her upon her oath.

But what if the woman cannot speak any language that the judge doth understand, as Cornish, Welsh, Dutch, or the like? then there shall be a Latimer, that is, an interpreter upon his oath to interpret truly.

(16) *Et*

(16) *Et fil nassent al fine, ne ceo liera mie.*] This is so to be understood, that it ought not to be received, if she be not examined, and freely assent, as is aforesaid; but if the fine be received, and recorded, the feme covert or her heirs shall not be received to aver that she was not examined nor assented: for this should be against the record of the court, and tending to the weakning of the generall assurances of the realm.

(17) *De pleine age, et de bone memorie, et hors de prison.*] See W. 2. cap. 48. hereof, and see Beverlies case, lib. 4. 123, 124, &c. See lib. 2. fol. 58. in Beckwiths case.

Lib. 2. fo. 58.
Beckwiths case.

(18) *Et la cause pur que tiel solempnitie doit estre fait en cel fine est, pur ceo que fine est ci hault barre, et de ci graund force, et de ci puissant nature en soy, que el forcelos nemy seulement ceux queux sont parties et privies a la fine, et lour heires, mes toutes auters gentes de mound, queux sont de pleine age, hors de prison, et de bone memorie, et deins les iv. meres, le jour del fine levie, s'ils ne mettront lour clame de lour action pur le pais, deins lan et le jour.*] Here are four things to be observed:

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1. First, the cause that such solemnity is used in the levying of a fine, wherein three things are to be observed; 1. for that it is so high a bar, 2. of so great force, 3. of so puissant a nature.

2. The end, to make an end of troubles and controversies, and to establish concord, peace, and repose in mens possessions and inheritances; and therefore a fine is called *finalis concordia*.

3. The means to attain to the same, *viz.* to forclose two kinde of persons, *viz.* parties and privies presently, and also the strangers in the world, *in futuro*.

4. A two-fold provision full of right and equity is made for strangers; first, that they be of full age, out of prison, of good memory, and within the four seas; secondly, that they put in their claim within the yeer and the day, after the fine levied.

By this act, if any stranger were within age, or in prison, or *non compos mentis*, or beyond the seas at the fine levied, * he is totally and for ever excepted; so as he after his full age, or coming out of prison, or recovering his memory, or coming into the realm, or any of their heirs need not to make any claim: and hereby a woman covert was bounden, if claim were not made within the yeer and day; and the reason was, for that she had a husband that was able to put in his claim: but if the husband were within age at the time of the fine levied, though the wife were of full age, the infancie of the husband (who was to make the claim, the wife being *sub potestate viri*) should privileged the state of the wife for ever. So as by the justice of the ancient com' law, wherof this act is a * declaration, two kinde of strangers to the fine were exempted and provided for; first such as by presumption of law had not sufficient understanding, as the infant, or *non compos mentis*; or had no notice, as the man in prison, or beyond sea, of the fine levied to make claim: and secondly, for such as had ancient rights, who are ever favoured in law, if they made their claim within the yeer and day.

(19) *Parties et privies, et lour heires.*] Parties are those that are parties to the originall.

(20) *Privies.*] First, that is to be understood of privies in blood, not onely of the heirs by the common law, which are here named; but heirs by the custome, here comprehended under this word [*privies*] as borough English, gavelkinde, or the like, which

Bract. li. 5. fo. 405. &c.
Brit. f. 216. b.
Fleta, li. 6. c. 53.
W. 2. cap. 1.
1. Part of the Institutes, § 441
* This is altered by the statute of 4 H. 7. cap. 24.

This act was made an. 18.
E. 1.
* Vide Mich. 15 E. 1. in banco Rot. 107. Effex. Pasch. 10 E. 1. Rot. 72. in banco Heref. John de la Cumbes case.
Pl. com. 357.

Lib. 3. fo. 23.
Walkers case.
Pl. com. 363.
per Brown.
W. 1. ca. 39.
6 E. 2. View 161.
40 A. B. 2.

Claim,

19 E. 2. Count.
de Vouch. 114.
12 E. 3. *ibid.*
326. Pl. com.
Howels case.

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Lib. 5. fo. 123.
Saffyns case, li. 9.
fol. 105. Mary
Podgers case.
41 E. 3. 13. li. 2.
93. Bingham,
lib. 3. 84, &c.
Case de Fines,
fo. 77. Fermors
case, li. 4. fo.
125. li. 8. 100.
72. li. 9. 87. 139.
li. 10. 90. 97.
lib. 11. fo. 69.
71. 78. 33 E. 3.
Estoppel 380.
21 E. 3. 21. 8 H.
4. 9. Dier 22 El.
373. 4 E. 4. 12.
Stanf. Prærog.
69.
* 4 H. 7. ca. 24.
32 H. 8. ca. 36.
26 R. 2.
Estoppel 211.

42 E. 3. 9. 41 E.
3. 14. 8 Aff. 33.
4 E. 3. 469.
13 Aff. 8. 8 H. 4.
8, 9. 12 E. 4.
15, &c. Lib. 3.
fo. 88, 89. in
case de Fines.

46 E. 3. 14. 13
E. 3. Replica-
tion 62. 17 E. 3.
53. 33 E. 3.
Estoppel 280.
22 E. 3. 17. 33
H. 16. 18. Lib.
3. fol. 88, 89.
Case de Fines.
4 E. 3. 46. Opi-
nion al. cont.
7 E. 3. 37.
Acc. 13 E. 3.
Replication 62.
11 R. 2. Elcheat
13. 14 H. 4. 32.
per Hankford.
Pl. com. 357. b.
Dier 3 Mar. 117.
This is altered

claim as heirs by custome; and is not intended of privies in estate, as joyntenants, the donor and donee, lessor and lessee, or the like; also this is to be understood of privies in succession, as bishops, abbots, and the like.

(21) *Mes auxy toutes autres gentes de mond'.*] In these words are included aswell tenant for yeers, tenant by statute merchant, and staple, copy-holders, and customary-holders, as tenants of free-hold and inheritance, if they be out of possession or seisin at the time of the fine levied, for a fine levied by a stranger cannot barre him that is in possession. And albeit the words of this law are very generall, yet do they not abrogate the statute of W. 2. *De donis conditionalibus*, which provideth for preservation of estates in tail. *Quod si finis super hujusmodi tenementa imposterum levetur, finis ipso jure sit nullus, nec habent hæredes hujusmodi, aut illi ad quos spectat reversio, &c. necesse apponere clameum.* * But that branch of *donis conditionalibus* continued in force notwithstanding this act, as to the right of the estate tail, untill the statute of anno 4 H. 7. by which act, and by the statute of anno 32 H. 8. an estate in tail is barred by fine with proclamations levied, and had according to those acts.

* In some case the party himself shall not be concluded of his averment against the expresse fine; as if two joyntenants be in fee, and they accept a fine *sur conusans de droit come ceo a eux, et les heires de lun*, the estate is not changed, and they may plead the former seoffment to them and their heirs, and that by law they could have no other fine.

And in some cases privies in blood, and inheritable also shall have an averment against the fine, notwithstanding this statute: and therefore if tenant in tail accept a fine *sur conusans de droit come ceo, &c.* yet the issue in tail, that is privie, and heir in tail shall aver continuance of possession in the father; for it standeth well with the fine, which is [*come ceo que ad de son done;*] and so it is in the case above, if tenant in tail had granted, and rendred the land to the conusor, the issue in tail might have averred continuance of possession in the father, for the fine was executory, and nothing vested in the conusor untill execution: but if tenant in tail levie a fine *sur conusans de droit come ceo*, the issue in tail, though he be not barred by the fine yet he shall not against this fine aver continuance of possession in the father, and that diversity was holden for law after this statute; neither after this statute could the issue in tail have generally pleaded, that *partes finis nihil babuerunt*, but was ousted thereof by this statute, albeit some have relyed much upon these words in this act, *rite levatus*; now the statutes of 4 H. 7. and 32 H. 8. and the exposition thereof *ubi supra*, make this out of question.

(22) *Le jour del fine levie.*] This is to be understood of a compleat fine, which giveth a double notice, one by the solemnity of the fine in court, and another by transmutation of possession in the country; as for example, one that hath a defeisable title in land accepts a fine thereof *sur conusans de droit come ceo, &c.* and granteth and rendreth the same to the conusor, who sueth not execution within the yeer and day, this fine shall not bar him that had the ancient right, because it is no compleat fine without possession, within the meaning of this act, for that by intendment he that had

right

right cannot take notice of the fine without transmutation of possession, and so out of the meaning of the law.

Note a fine *sur consens de droit come ceo*, &c. is said to be levied when the writ of covenant is returned, and the concord and the kings silver duly entred, this maketh the land to passe, and from this shall the yeer and day be accounted, albeit the fine be ingrossed afterward.

(23) *Si ils ne metteront leur claime*, &c.] For the preserving of ancient * rights at the com' law, there were 4 manner of claims, whereof two were by matter of record, and two by act in the country; by matter of record, as by a *præcipe quid reddat*, according to the truth of the case brought within the yeer and day by him that right had, or in ancient time by an entry of a claim, entred in the record of the * foot of the fine; but first it must have been made in open court, [*appono clavum meum tali liti vel concordie*, &c.] And two by acts in the country, as by an actuall entry into the land, by him which right had, and whose entry was congeable, or by a continuall claim which amounted to an entry; but all these must be done by him that had a present right of action, or a present right of entry, for no other person could make any claim: and therefore if there were tenant for life, or in tail, the reversion or remainder over in * fee, he that had right of reversion or remainder expectant upon an estate for life, or in tail, could make no claim, because he had neither present right of action nor of entry; and therefore in that case the tenant for life, or in tail must make his claim, and that claim either by action or entry upon the foot of the fine, or by lawfull entry or continuall claim, should not onely have preserved their own right, but also the right of them in reversion or remainder; but if no claim were made by the particular tenant, the right of them in the remainder or reversion were for ever bound by the common law.

^b This is altered in two respects by the said act of 4 H. 7. for thereby the claim must be by action or entry, and therefore a claim entred upon the foot of the fine at this day is not available. Also they that have a right of a reversion or remainder expectant upon an estate tail, or for life, shall have five yeers after their title come unto them, as by that act appeareth.

The words of this act be, [*silz ne missont leur claime*] and yet in some case the right of one that might claim, and doth not, shall be preserved; * as if a disseisor be disseised, and the second disseisor levie a fine, in this case if the first disseisor enter within the yeer, this shall preserve the right of the disseisee, because the first disseisor by his entry avoided the whole estate given by the fine, and yet the disseisee might have entred himself [*et sic de similibus*]; but it must not have been an empty fine that should have barred the right of a stranger, but a fine compleat, as hath been said.

^a This law continued until the parliament in the four and thirtieth yeer of E. 3. and then the statute of non-claim was in that parliament made, which took away the effect and force of this law, and of the common law in this point, whereby great contention arose, and few men were sure of their possessions, which continued till the * parliament, anno 4 H. 7. and then that mischief was reformed, and the ancient common law excellently moderated by the statute of 4 H. 7. See the statute of 32 H. 8. which acts have for the common quiet and repose of all been with great wisdom and judgement

by the statute of 4 H. 7. and five yeers given, &c. 22 H. 6. 13. Pl. com. 432.

Pl. com. 358, 359, &c. in Stow. case.

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* Vide infra. Pasch. 18 E. 1. Bract. li. 5. fo. 436. nu. 7. Fleta, li. 6. c. 52. Hil. 16 E. 2. in cui in vita. Pl. com. 359. See 1. Part of the Instit. § 416. ^a Mich. 15 E. 1. in banco Rot. 107. Essex. Lucia filia Joh. de Northope. But there it is adjudged, that if tenant for life, the reversion over, and an estranger that hath nothing in the land levie a fine, without vesting or displacing of any of the estates, he in the reversion shall not be bound to make any claim, because *partes fin. nihil habuerint*. ^b 4 H. 7. c. 24. See Pasch. 18 E. 1. Rot. 1. Robert Bakuns case, a claim made upon the foot of the fine. Westmerl. And in the same roll Rob. de Hudings made the like claim for 5 s. rent. Northamp. ^c 16 E. 2. Cont. claim 10. Pl. com. 358. b. ^d See the 1. part of the Institutes, sect. 441. ^e 4 H. 7. ca. 24.

32 H. 8. ca. 34.
 Lib. 1. fo. 96.
 Shellings case.
 Lib. 2. fo. 15, 16.
 Wisemans case.
 93. Bingham's
 case. Lib. 3. fo.
 84, &c. Le case
 de Fines, & ibid.
 77, &c.
 Fearnors case.
 Lib. 4. fo. 125.
 Beverlies case.
 Li. 5. fo. 124.
 Lib. 8. 100. 72.
 Li. 9. 87. 104,
 105, 106. 139,
 140, 141. Lib.
 10. 50. 96, 97.
 Li. 11. 69. 71. 78.
 Pl. com. 360, 361.
 Stowels case.

* [519]

31 Eliz. c. 2.

1 Mar. Parl. 2.
 c. 7.

Dier 3 El. f. 186.

23 El. ca. 3.
 Vide li. 5. f. 40.
 Dormer's case.
 eodem. Lib. fo.
 28. & 39. & 43,
 44, 45. for
 amendment of
 fines, &c.
 Tr. 32 Eliz. in
 Communi Banc.
 Cottons case.

judgement expounded; and that a fine with procl. and five years past doth bar the lord in ancient demesne of his writ of deccit, and likewise a writ of error is also thereby barred.

And though this act of 18 E. 1. be repealed, yet may it serve in many respects to explain the statutes of 4 H. 7. and 32 H. 8. For the true understanding of the common law, and of former statutes; is the sure master expositor of the latter.

To the former reports or expositions (wherein are former authorities out of the Lord Dier & Pl. Com: cited) two things are necessary to be added; the first, wherein the statute of 4 H. 7. is altered, or strengthened by any latter act of parliament: secondly, what other case heretofore adjudged upon any branch of either of the said statutes, and not heretofore published, or any other matter, may serve for the strengthening of fines, being the common assurance of the realm, or of the estates of the subjects, concerning free-holds and inheritances.

* As to the first, where by the statute of 4 H. 7. it is ordained that after the ingrossing of the fine, &c. the same fine be openly and solemnly read and proclaimed in the same court the same terme; and in three termes then next following the same ingrossing in the same court, at foure severall dayes in every terme. By the statute of 31 Elizab. it is enacted, that all fines with proclamations shall bee proclaimed onely foure times, that is to say, once in the terme, wherein it is ingrossed, and once in every of the three termes holden next after the same ingrossing; and that every fine proclaimed, as is aforesaid, shall bee of as great force and effect in law to all intents, and purposes, as if the same had bene sixteene times proclaimed; according to the statutes heretofore made: a beneficiall law; for the fewer proclamations, the safer. See the statute of 1 Mar. for strengthening of fines when proclamations be not made, &c. by reason of adjournement of any terme.

It hath bene resolved that this act extendeth where but part of the terme is adjourned, for it is a favourable law, and to be taken by equitie.

Another statute is made for the establishment of fines and recoveries in anno 23 Eliz. which is evident, and whereupon we have knowne no question made, and therefore referre the reader to the whole chapter, being a profitable and beneficiall law, and of the most part of freeholders of this realm necessary to be known.

As to the second, betweene Sunie & Howes, Trin. 32 Eliz. *in communi banco*, the case was, Thomas Cotton was tenant in taile of the moiety of certaine lands, and of the other moiety hee was tenant for life, the remainder to William Cotton his eldest sonne in taile. William Cotton went beyond sea to Antwerpe, and after the said Thomas Cotton anno 19 Elizab. levied a fine of the whole with proclamations, and within the yeare William Cotton died at Antwerpe, and never came into England; William his sonne being within age entred anno 31 Eliz. And it was adjudged that for the moiety whereof Thomas Cotton was tenant in taile, William the sonne of William was barred by this act of 4 H. 7. but for the moiety of William the father, the entry of his sonne William was lawfull; for albeit that William the sonne could not take advantage of the clause that gives benefit to him that is beyond sea, and his heires to enter, or take his action within five yeares after they bee within this land, because in this case William the father after the fine levied

never

never was within the land; yet for that persons out of the realme at the time of the fine levied, amongst others having a present right, are excepted out of the body of the act (which worketh the barre) therefore where he that is beyond sea at the time of the fine levied, and never returnes, is within the exception out of the body of the act, and hee and his heires may enter or take his action at any time: but in case hee doth returne, hee and his heires must enter or take his action within five yeares after his returne: and so it is of an infant being party to the fine, and having a present right, if he dieth during his infancy, he or his heires may enter or take his action at any time: and so it is of a person that is *non compos mentis* by the act of God, if hee die whiles hee is *non compos mentis*; or a man in prison, which is by act in law, if hee die in prison; or a feme covert, which is by her owne act, if shee die whiles shee is covert, being no parties to the fine. For all these are within the reason of the case adjudged of him that is out of the realme (which going out of the realme was his owne act) and never returned.

See Pl. Com. fo. 366. a. the opinion of Brown and Saunders, lege, & perlege nisi temere.

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See the statute of 21 *Jacobi regis* cap. 2. for the strengthening of the estates of the subjects against the king and his successors.

STATUTUM DE FINIBUS LEVATIS, [521]

Editum Anno 27 Edw. I.

QUIA fines in curia nostra levati finem litibus debent imponere, et imponunt, et ideo fines vocantur, maxime, cum post duellum et magnam assisam in suo casu ultimum locum finalem teneant imperpetuum (1), jamque per aliquod tempus præteritum tam tempore claræ memoriæ domini Henrici regis avi nostri quam nostro partes eorundem finium (3) et earum partium hæredes (4) contra leges et consuetudines regni nostri antiquitus usitatas super hujusmodi finibus (2) adnullandis et evacuandis admittebantur, proponentes quod ante finem levatum à tempore levationis ejusdem, et postea petentes seu querentes aut eorum antecessores de tenementis in finibus contentis, aut de aliqua parte eorundem semper fuerunt seisiiti, et sic fines hujusmodi rite levati per juratores patriæ falso subornatos et malitiose pro-

FORASMUCH as fines levied in our court ought and do make an end of all matters, and therefore are called fines principally, where after waging of battail or the great assise in their cases ever they hold the last and final place. And now by a certain time passed, as well in the time of king Henry of famous memory, our grandfather, as in our time, the parties of such fines and their heirs, contrary to the laws of our realm of ancient time used, were admitted to annul and defeat such fine, alledging, that before the fine levied, and at the levying thereof, and since, the demandants or plaintiffs, or their ancestors, were alway seised of the lands contained in the fine, or of some parcel thereof; and so fines lawfully levied were many times unjustly defeated

curatos multotiens evacuabantur et annullabantur minus iuste: nos volentes super præmissis remedium adhibere in parlamento nostro ad Westm', statuimus, quod dictæ exceptiones seu responsiones vel inquisitiones patriæ super huiusmodi exceptionibus seu responsionibus nullo modo contra huiusmodi recognitiones et fines de cætero admittantur. Et nos vero volumus, quod statutum istud tam locum habeat ad fines prius levat' quam imposterum levand'. Et videant iustic', quod notæ et fines in curia nostra imposterum levand' publice et solemniter legantur, et quod placita interim cessent omnino, et hoc fiat per duos dies in septimana secundum discretionem iustic'.

feated and adnulled by jurors of the country falsly and maliciously procured; we therefore, intending to provide a remedy in the premisses, in our parliament at Westminster have ordained, that such exceptions, answers, or inquisitions of the country, shall from henceforth in no wise be admitted contrary to such recognifances or fines. And further we will, that this statute shall as well extend unto fines heretofore levied, as to them that shall be levied hereafter. And let the justices see that such notes and fines, as hereafter shall be levied in our court, be read openly and solemnly, and that in the mean time all pleas shall cease; and this must be at two certain days in the week, according to the discretion of the justices.

(Rast. 349, &c. 3 Rep. 88. Fitz. Replic. 62, 63. 66. 42 Ed. 3. f. 19. 18 Ed. 1. stat. 4. of fines. 1 R. 3. c. 7. 4 H. 7. c. 24. 31 El. c. 2.)

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(1) *Quia fines in curia nostra levati finem litibus debent imponere, et imponunt, et ideo fines vocantur, maxime cum post duellum et magnam assisam in suo casu ultimum locum finalem teneant imperpetuum jamque per aliquod tempus præteritum.*] Herewith doe agree all our ancient authors, viz. Glanvill, *Nota quod talis dicitur finalis concordia eo quod finem imponit negotio, adeo ut neuter litigantium ab eo de cætero licent decedere.*

Glanv. li. 8. c. 3.

Braet. 1. 5. fo. 435. li. 3. 106. lib. 4. 246.

Braetton, *Item si per concordiam, et finem fact', quæ similiter peremptoria est, quia dicitur finalis concordia, et ideo finalis, quia imponit finem litibus.*

Britton, fo. 90, 91.

Britton fol. 90. & 91. *Sont ascuns choses corporels que home ne purra my bien purchaser sans aide de nostre court, sicome fees, et propretes et dount per accord del purchaser, et del donour, coviendra lever fine en nostre court parmy la quel tiel manner de purchase tiendrent effect et establete.*

See before in the exposition of the statute called *modus levandi fines*, in the parliament roll, anno 19 E. 1. Rot. 12. the case of Margery late wife of Thomas Weyland.

(2) *Jamque per aliquod tempus præteritum tam tempore claræ memoriæ domini Henrici regis patris nostri quam nostro partes earundem finium et earum partium hæredes (contra leges et consuetudines regni nostri antiquitus usitatus) super huiusmodi finibus, &c.]* The mischiefe, or rather the abuse before this statute, was in allowance of averments by parties and privies for adnulling of fines levied *contra leges et consuetudines regni nostri antiquitus usitatas*, &c. Whereby fines were many times unjustly avoided: and what such averments were, and wherefore they were admitted, is declared by Stoner, one of the justices of the court of common pleas, who reported that he

heard Sir William Bereford knight, then chiefe justice of that court say, that in ancient times parties and privies could not avoid fines, [*proponentes*] as this act saith, *quod ante finem levatam et tempore levationis ejusdem, et postea petentes seu querentes aut eorum antecessores de tenementis in finibus contentis, aut de aliqua parte earundem semper fuer' seisis*. But afterwards (in the raigne of H. 3. in the time of insurrections and civill warres by the graundees of this realme) it was used by the maintenance of the graundees, that parties and privies might avoid fines by such averments, which averments in the raigne of E. 1. were continued untill the making of this act; all which was affirmed by Sir William Herle chiefe justice, and further he said, that the same appeared also by this statute *de finibus*, as in truth it doth.

4 E. 3. 46.

(3) *Partes earundem finium et earum partium hæredes, &c.*] So as this act taketh away the said averment, which by the maintenance of the graundees of the realm had unjustly crept in by parties and privies; for the mischief before this statute was, as hath been said, that when the *conusans de droit, &c.* was made to him that had never any thing before, and the conusee graunted, and rendred the same back again at the same instant to the conusor for life, or in taile with remainder over, who alwaies was seised, and in possession of the land; privies (by colour that there was no transmutation of possession) were against law permitted to avoid fines by the averment aforesaid.

And albeit this statute extendeth to averments taken by parties and privies, and extendeth not to averments made by strangers, that are no parties nor privies to the fine, yet by the common law the hautesse and puissant force and nature of fines was such, that a meer stranger could not have a generall averment against a fine; and therefore it is reported by Shard one of the justices of the court of common pleas, that it was resolved by the sages of the law, that the parties, or their heirs should have no averments against fines levied contrary to the fine to avoid it; and that a stranger should have no generall averment directly to avoid a fine, if it were not upon some speciall matter, for he that is tenant after the fine levied, is intended tenant under the state of some of the parties to the fine, to whom by the common law a generall averment is not given more then to the party or privie: and the speciall matter which giveth him the averment is, that after that he pleads that the parties to the fine had nothing in the land at the time of the fine levied, he doth formerly adde, that either he himself, or some other whose estate he hath, was seised at the time of the fine levied, &c. But yet that matter is not traversable, but a mean to traverse and avoid the fine, and therefore the tenant that pleads that plea doth conclude, *et de hoc ponit se super patriam*, without a further replication; for Littleton himself that famous lawyer reporteth, that it was adjudged in the time of Sir John June, chief justice of the court of common pleas (who was constituted chief justice of that court, Februar. 9. anno 14 H. 6. and continued untill the 20 of Jan. anno 17. of the same king, and then was made chief justice of the kings bench) that when the tenant pleads in bar against a fine, *quod partes finis nihil habuerunt in ten' tempore levationis finis, nec aliquis eorum aliquid habuit, sed quidam T. B. adiunc' fuit seisitus, &c. cuius statum, &c. Et de hoc ponit se super patriam, et prædictus querens similiter*. And if it be found, that the parties to the fine had nothing, &c. the fine

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17 E. 3. 54.
Wakes case.13 E. 2. Replika-
tion 62. 32 E.
3 Vouch. 96. 13.
ibid. 119. Gar-
ranty 37. 41 E.
3. 14. 14 H. 4.
33. b.40 E. 2. 30. b.
Dier 12 Eliz.
290, 291.
33 H. 6. 21. 22
H. 6. 57. 17 E. 3.
53. 22 E. 3.
Replication 63.
42 E. 3. 21. 19
R. 2. Replica-
tion 53. 14 H. 4.
53. 12 E. 4. 13.
3 H. 7. 9. Dier
12 Eliz. 291.
33 H. 6. 21, &c.
ubi supra.
40 E. 3. 30. b.
41 E. 3. 14. 14
Dier 12 E. 2.
290, 291.

Dier ubi supra.
Pl. com. 354.
432.

13 E. 3. Replic.
62. 17 E. 3. 52.

Rot. Parliam.
an. 14 E. 3. no.
31.
The case of Sir
John Stanton,
and Anne his
wife in a F. and.
13 E. 3. Vouch.
119.
22 E. 3. 4. 24 E.
3. 36. 78. 79.
29 E. 3. 13.
18 Aff. 6. 27
Aff. 28. 25 Aff.
p. 3. 43 Aff. 6.
23 Aff. 13. 15 E.
3. Maint. de
Bre. 55. 3 E. 3.
ibid. 13. 14.
Itiner. North.
17 E. 2. ibid. 1.
1 E. 3. 5. 2 E. 3.
30. 24 E. 3. 79.
4 E. 3. 30.
8 E. 3. 33.
24 E. 3. 79.

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12 E. 2. Aff. 116.

13 E. 3. Gar-
ranty 17.

3 E. 3. 25. b.
24 E. 3. 78.
14 E. 6. 8. 25.
Dier 13 Eliz.
290, 291.

shall be avoided, though the speciall matter of the seisin of himself, or of a stranger at the time of the fine levied be not found. And so it is in the case of the like plea to avoid a recovery, or in case of a counterplea of a voucher, and the like: all which you may read in that report; and this kind of pleading remains at the com- law since the statute of 4 H. 7,

(4) *Et eorum partium hæredes.*] This is not intended of an heir in blood onely, but of the heir of the land; for *hæres dicitur ab hæreditate*: and therefore if the heir apparant be seised of land, and the ancestor levie a fine of the same land, and dyeth, this shall not bar the heir, for he claims not the land, whereof the fine is levied, as heir unto him.

See in the parliament roll of anno 14 E. 3. a notable case of an averment taken by a stranger against a fine, and afterwards adjudged, which case is abridged by Fitzherbert, 13 E. 3. tit. Voucher 119. but more effectually in the parliament roll.

But seeing the learning concerning averments of parties and privies, and of strangers hath been delivered as is aforesaid; it is objected, that when joyntenancie is pleaded by fine in abatement of the writ, that a stranger for maintenance of his writ could not take any generall averment against the fine. And this being agreed unto them, as is aforesaid, then they proceeded, that in the case of a fine the demandant could have no replication thereunto, as to say that the other joyntenant not named in the writ by his deed released before the writ brought, or that they both infeoffed A. which reinfeoffed the tenant; and this was said to be in respect of the height, and puissant force and nature of the fine: but to this it was answered, that the same held at the common law in case of joyntenancie by deed, and therefore that could not be the cause thereof. Then another reason was sought for, and that was, that the land was the free-hold of another, and therefore it should not be put in tenancie (that is, in plea of law in danger to be lost) without the party himself: but if the fine or deed were made by the demandant himself to the tenant and another, then he might confesse and avoid the fine; as to say, that since that time the joyntenant infeoffed him, or the like, because the demandant was party. But again it was affirmed, that that reason could not hold in respect of the strangers free-hold, for that might hold also where joyntenancie is pleaded without fine or deed, but there it is evident that the demandant shall maintain his writ, and try a third persons free-hold, nay the judges themselves were sometimes so fearfull to weaken the strength and force of fines, and sometime so bedazeled with the bright solemnity of the fine, as Sir John Stoner chief justice of the court of common pleas did say, that an averment ought to be had against a fine, both by conscience and the law of God; and yet lest the fine should be avoided, he would be advised. This doubtfulnesse grew, for that the true diversity was not observed between averments, where they were made by parties and privies, and where by strangers, nor the true pleading thereof resolved upon.

Now, that truth (the mother of justice) might not be suppressed, it hath been resolved that against a joyntenancie pleaded by fine, the demandant may confesse and avoid the fine, as to say, that the joyntenant not named released before the writ brought, or that they both infeoffed one, who reinfeoffed the tenant, or the like; for these

or

or the like pleas confessing and avoiding the fine, do in no sort weaken the strength or force of the same.

But against joyntenancie by fine the demandant cannot take a generall averment, that the tenant is sole seised, for that should seem to weaken the force of the fine: and the statute of *conjunctim feoffatis*, anno 34 E. 1. extends not to joyntenancie by fine, but to joyntenancie by deed onely, to take the generall averment against the deed, that the tenant is sole seised: and thus are all the books (whereof there be many) that seemed *prima facie* to disagree, well reconciled. And this statute of *conjunctim feoffatis*, extends not onely to assises, but to writs of dower, and other reall writs of *præcipe quod reddat*, * but not to writs of gard, or the like.

† Green chief justice, anno 24 E. 3. granted, that this act of 34 E. 1. was made more in damage of the people, then in amendment of the common law.

43 Aff. p. 6. 32 Aff. p. 4.
† 9 H. 6. 1. 34 H. 6. 16.

* 37 Aff. p. 3. 41 E. 3. 15. 49 E. 3. 17. 7 R. 2. Maint. de Bre. 3.

Stat. de Conjunctim feoffatis, 34 E. 1. c. 1. 17 E. 2. Maint. de Bre. 1. Regist. 12. 1 E. 3. 5. 2 E. 3. 20. 4 E. 3. 30. 8 E. 3. 53. 15 E. 3. Maint. de Bre. 55. 3 E. 3. ibi. 13, 14. 18 Aff. 6. 21 Aff. 23. 22 E. 3. 45, 46. 22 Aff. 54. 23 Aff. 13. 24 E. 3. 76, 79, 29 E. 3. 13.

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Confirmationes Chartarum de Libertatibus Angliæ et Forestæ.

Anno vicefimo quinto Edwardi primi.

CAP. I.

EDWARD per la grace de Dieu roy Dangleterre, seignieur Dirlande, et duke Daquitaine, a tous ceux que cestes lettres presents (1) oiront, ou verront, salutem. Saches nous al honor de Dieu, et de saint esglise, et au profit de nostre realme (2), avoir grant pur nous, et pur nous heires, que la chartre des franchises, et la chartre de la forest, les queux fuerent faitz per commen de tout royaume (3) en le temps le roy Henry pier, soient tenus en tous lour points, sans nul blemissement, et volons que mesmes cels chartres desous nostre seale soient envoyes a nous justices auxi bien de la forest, come as autres: et a tous les viscontes des counties, et a tous nous autres ministres, et a tous nous. cities parmy le realme ensemblement

EDWARD, by the grace of God, king of England, lord of Ireland, and duke of Guian, to all those that these present letters shall hear or see, greeting. Know ye that we, to the honour of God and of holy church, and to the profit of our realm, have granted for us and our heirs, that the charter of liberties, and the charter of the forest, which were made by common assent of all the realm, in the time of king Henry, our father, shall be kept in every point without breach. And we will that the same charters shall be sent under our seal, as well to our justices of the forest, as to others, and to all sheriffs of shires, and to all our other officers, and to all our cities throughout the realm, together

ment ove nous briefes (4), en les queux ferra contenus que ils facent les avant-dits chartres publier, et que ils facent dire al people, que nous les avons grants en tous points, et a nous justices, viscontes, maires, et autres ministres, que les loies de la terre de sous nous ont a guier mesmes les chartres (5) en tous leur points empledés devant eux en jugement, facent allower: c'estascavoir le grande chartre come ley common, et la charter de la forest, en amendement de nostre realme (6).

together with our writs, in the which it shall be contained, that they cause the foresaid charters to be published, and to declare to the people that we have confirmed them in all points; and that our justices, sheriffs, mayors, and other ministers, which under us have the laws of our land to guide, shall allow the said charters pleaded before them in judgement in all their points, that is to wit, the great charter as the common law, and the charter of the forest, for the wealth of our realm.

(23 Ed. 1. stat. 3. c. 1.)

For the stile of the kings, and for the king that spake first in the plurall number [*nous*] as our king here doth, see *Magna Charta*, cap. 1. and the first part of the Institutes, sect. 1.

(1) *Per ses letters patens.*] Acts of parliaments are many times in form of charters, or letters patents, *vide Magna Charta*, cap. 1. & liber 8. fol. 1, &c. *in casu principis*

The title of these statutes is, *Confirmationes chartarum de libertatibus Angliæ et forestæ*; and true it is, that hereby the said charters are expressly confirmed: but they are also excellently interpreted (which is a confirmation in law) for here is nothing enacted, but it is included within *Magna Charta*.

(2) *Al honour de Dieu, et de saint esglise, et au profit de nostre realme.*] This is, or should be the true end of all parliaments.

See *Magna Charta* in the stile thereof, and all succeeding parliaments have in effect followed this precedent.

(3) *Per common de tout realme.*] That is, by the common assent of the realm by authority of parliament; and many times *per communitatem Angliæ*: it signifieth also an act of parliament; for it cannot be *per communitatem Angliæ*, but by parliament, as hereafter shall be shewed.

(4) *Soient envoyes a nous justices, &c. et a tous nous cities, &c. ensemblement ove nous briefs.*] Before printing, and till the reign of H. 7. statutes were ingrossed in parchment, and by the kings writ proclaimed by the sherife of every county: this was the ancient law of England, that the kings commandments issued, and were published in form of writs (as here it was:) an excellent course, and worthy to be restored.

(5) *Que les loies de la terre de sous nous ont a guier mesmes les chartres, &c.*] This is a clause worthy to be written in letters of gold, *viz.* that our justices, sherifes, maiors, and other ministers, which under us have the laws of our land to guide them, shall allow the said charters in all their points, which in any plea shall come before them in judgement: and here it is to be observed, that the laws are the judges guides, or leaders, according to that old rule, *Lex est exercitus judicium tutissimus duxor*, or *lex est optimus judicis xenagogus*, and *lex est tutissima castra*.

There is an old legall word, called [*guidagium*] which signifieth an office of guiding of travellers through dangerous and unknown wayes;

wayes; here it appeareth, that the laws of the realm hath this office to guide the judges in all causes that come before them in the wayes of right justice, who never yet misguided any man, that certainly knew them, and truly followed them.

(6) *Le grand chartre come ley common, et la chartre de la forest, en amendement de nostre realme.*] The sense hereof is, that the great charter, and the charter of the forest are to be holden for the common law, that is, the law common to all; and that both the charters are in amendment of the realm; that is, to amend great mischiefs and inconveniences which oppressed the whole realm before the making of them.

CAP. II.

ET volons, que si nul judgement soit done desormes encountre les points des chartres avantdits per justic, ou per autres de nous ministres, que encountre les points des chartres tenont plee devant eux, soit defaite, et pur nient tenus.

AND we will, that if any judgement be given from henceforth contrary to the points of the charters aforesaid by the justices, or by any other our ministers that hold plea before them against the points of the charters, it shall be undone, and holden for nought.

(42 Ed. 3. c. 1.)

Whatsoever judgement is given against the statute of *Magna Charta*, or of *Charta de foresta* is made void by this act, and may be reversed by writ of error, because the judgement is given against the law, for this act saith, *soit defait, et pur nient tenus*.

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CAP. III.

ET volons que mesmes cestres charters desous nostre seale soient envoys as esglises cathedrals par my nostre royaume, et la demoureront, et soient deux foits per an lieus devant le peuple.

AND we will, that the same charters shall be sent, under our seal, to cathedral churches throughout our realm, there to remain, and shall be read before the people two times by the year.

Here it is to be observed what care was taken for the preservation of these charters, and of this act of parliament, for it is good chance to obtaine, but great wisdom to keep.

CAP. IV.

ET que archevesques et evesques denuncient les sentences d'excommunication contre tous iceux, que contre les avantdits chartres vendrunt en diét ou en fait, ou en eide, ou en conseil, ou en nul point enfreindrunt, ou contre vendront. Et que cels sentences soient denuncies et publies deux foits per an per les prelates avantdits. Et si mesmes les prelates en nul de eux soient negligentes en la denunciation sujsdit faire, per les archevesques de Cantebrie, et Deverwike, que pur temps serront, sicome covient, soient repris et destreintx a mesme cel denunciation faire en la forme avantdit.

AND that all archbishops and bishops shall pronounce the sentence of excommunication against all those that by word, deed, or counsel do contrary to the foresaid charters, or that in any point break or undo them. And that the said curses be twice a year denounced and published by the prelates aforesaid. And if the same prelates, or any of them, be remiss in the denunciation of the said sentences, the archbishops of Canterbury and York for the time being shall compel and distrein them to the execution of their duties in form aforesaid.

Stat. de Tallagio, &c. cap. 5.

This excommunication the prelates could not pronounce without warrant by authority of parliament, because it concerned temporall causes.

CAP. V.

ET pur ceo que ascuns gents de nostre realme soy doubtent, que les eides (1) et les mises (2), queux il nous ont fait avant ses heurs pur nous guerres (3) et autre besoignes de leur graunt et leur bon voluntie, en quel maner que faits soient, puissent turner en servage a eux et a leur heires, pour ceo que ils serront autre foits troves en rolle, et auxint prises que cunt oste faits parmy le royaume per nous ministers en nostre nesme. Nous avons grantes pur nous et pur nous heires, que mes tielx eides, mises ne prises, ne trerons a custome pur nul chose que soit fait, ou que per rolle, ou en autre maner poet estre trove.

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AND for so much as divers people of our realm are in fear, that the aids and tasks which they have given to us beforetime towards our wars and other business, of their own grant and good will (howsoever they were made) might turn to a bondage to them and their heirs, because they might be at another time found in the rolls, and likewise for the prises taken throughout the realm by our ministers: we have granted for us and our heirs, that we shall not draw such aids, tasks, nor prises into a custom, for any thing that hath been done heretofore, be it by roll or any other precedent that may be founden.

(1) Eides

(1) *Eydes et mises.*] *Auxilia* at this time was a generall word, not onely including aides due by law, and tenure, as *aide pur faire fies chivalier, pur file marier, &c.* but aides also graunted by the free will of the subjects in parliaments, which afterwards were called subsidies; and here this word *eides* is taken for an aide graunted by authority of parliament.

(2) *Mises.*] Are properly taken for expences or charges, but here in this act they are taken for tasks, taxes, tallages, or takings.

(3) *Pur nous guerres, &c.*] The king had obtained by free consent, and good will in parliaments precedent aids, subsidies or tasks for the maintenance of his warres in forein parts, which howsoever they were graunted in full parliament, yet (as here it appeareth) many men doubted, might turne in servage of the subjects of the realme, for that it was holden that they ought not to contribute to the maintenance of the kings warres out of the realme; and thereupon Bohun earle of Hereford, and Essex high constable of England, and Bigot earle of Norfolk, and Suffolk, and marshall of England, for that it concerned matter of armes and warre, exhibited a petition to the king in French, in anno 25 E. 1. before the making of this act, which I have seen aunciently recorded, on the behalfe of the commons of England, concerning the said matter, and thereupon the king at this parliament yelded to this act, that such eides, tasks, or takings should not be drawn to custome for any thing that had beene done in that behalfe.

But yet this matter was never in quiet untill it was more particularly explained by divers acts of parliament, which we have drawn into one body of a law divided into severall branches.

1. No man shall be charged to arme himselfe, or to finde men of armes, or any hoblors or archers (other then those that hold by such services, or devoires of the king, or of other lords) if it be not by common consent, and graunt in parliament.

2. No man shall be compelled to goe to the kings warre out of his shire, but where necessity of sudden comming of strange enemies into the realme.

3. No man shall be charged to give any wages either to the preparers or conveyors of souldiers, or to the souldiers to goe into Scotland, Gascoine, or elsewhere; but that men of armes, hoblors, and archers, chosen to goe into the kings service out of England, shall be at the kings wages from the day they depart out of the counties where they were chosen, till they return.

Which acts of parliament are but declarations of the ancient law of England.

And according to this ancient law, the commons after the said declaratory acts of parliament did, when this point concerning maintenance of warres out of England came in question, make their continuall claim of their ancient freedom and birth right, as in 1 H. 5. and in 7 H. 5. &c. the commons made protestation that they were not bound to the maintenance of warre in Scotland, Ireland, Calice, France, Normandie, or other forein parts, and caused their protestations to be entred into the parliament roll where they yet remain; which in effect agreeth with that, which upon like occasion was made in this parliament of 25 E. 1.

But here may be observed, that when any ancient law or custome of parliament is broken, and the crown possessed of a precedent, how

See hereafter for this word, Stat. de Tallag. non conced. 34 E. 1.

See the statute of 34 E. 1. ubi sup.

Vide Calvins case. lib. 7. fol 7, 8, &c.

1 E. 3. c. 5. &c.
c. 7. 25 E. 3.
cap. 8. 1 E. 3.
cap. 5. 4 H. 4.
cap. 13. 18 E. 3.
cap. 7. 4 H. 4.
cap. 15.

Lib. 7. cap. 7, 8.
Calvins case.
Rot. Parl. 1 H. 5.
nu. 17. 7 H. 5.
nu. 9, &c. See
25 E. 3. cap. 7.
Rot. parl. 4 H. 4.
nu. 48. 20 R. 2.
nu. 48. 4 H. 4.
cap. 13. 11 H. 7.
c. 7. 19 H. 7.
c. 1. vid Rot.
clausus 44 E. 3.
Sir Rich. Pem-
brughs case.
Vide Mag.
Chart. c. 20.
verb. Exile. Con-
firm. chart.
25 E. 1.

how difficult a thing it is to restore the subject again to his former freedom and safety.

Now how of ancient time soldiers were levied, mustered and entred of record, &c. (an excellent military policy) which will conduce much to the finding of the true sense of this, and other statutes, concerning this matter, see the third part of the Institutes, cap. Felony in soldiers that depart, &c. in the exposition of the statute of 18 H. 6. cap. 19. See the statutes of 11 H. 7. cap. 7. and 19 H. 7. cap. 1.

C A P. VI.

ET auxint avons graunt pur nous, et pur nous heires, as archevesques, evesques, abbes, priors, et as autres gents de s. eglise, as countes, barons, et a tout la communalty de la terre, que mes per nul besoigne tiels manners des aides, mises, ne prises, ne prendrons forsque de common assent de tout le royaume, et pur le common profit de ceo: saves le auncient aides, et prises dues et accoustomes (1).

MOREOVER we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors, and other folk of holy church, as also to earls, barons, and to all the communalty of the land, that for no business from henceforth we shall take such manner of aids, tasks, nor prises, but by the common assent of the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed.

(34 Ed. 1. stat. 4. c. 1.)

The cause of the making of this branch, and of such special mentioning of the clergy was, that the king did against the auncient lawes and customes of the realme collect money by commission without assent of parliament, not onely of earls, barons, and communalty, but of the clergy, who in those dayes claimed a privilege, and immunity from secular aides and subsidies, (by pretext of a late constitution made by Pope Boniface :) the clergy stood so stoutly in defence of their privilege, that sir Robert de Brabazon the kings chiefe justice pronounced openly in the kings bench, (*in terrorem*) that from thenceforth no justice should be done for them at their suit, but justice should bee done against them in the king's courts at any other mans suit. But at this parliament this branch gave satisfaction to all, for hereby it is enacted that every aide and task and other taking must have two special properties, the one in the creation, viz. that it bee given by the common consent of the whole realme in parliament; the other in the execution, viz. that it be given and imployed for the common benefit of the whole realme, and not for private or other respects; which words [*et pur le common profit de ceo*] in the impression of Tottell are injuriously omitted.

(1) *Saves les auncient aides et prises dues et accoustomes.*] The auncient aides are here intended, *aide pur file marier, pur faire fits chevalier*, and reliefs by reason of tenures, and the auncient takings or seizures are here intended, such as were due to the crown, *jure prerogative*.

Wid. Stat. de
34 E. 1.
De Tallagio non
concedendo.

prærogative, as waifes, straves, the goods of felons, and out-laws, deodands, and the like, [*ratione tenuræ*] as heriots, and such other as did lie in seifure or taking by reason of any tenure or custome.

C A P. VII.

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ET pur ceo que tous le plus de la comminaltie du realme seifent durement greve de la maletot des leyns, cestascavoir, de chescun sacke de leyn quarant soulz (1), et nous ont pries, que nous les voudrons releffer : nous a leur prier les avons pleinement releffes. Et nous avons graunt pur nous et pur nous heires, que mes celes ne prendrons sans leur common assent, et leur bon volonte (2). Sauve a nous et a nous heires la custome des leyns (4), pealx, et quires avant grauntes per la comminaltie avantdit (3). En tesmoignances des queux choses nous avons fait faire cestes nous letters overts. Tesmoigne Edward nostre firs a Londres le x. jour Doctobre, lan de nostre reigne xxv.

AND for so much as the more part of the communalty of the realm find themselves fore grieved with the maletent of woolls, that is to wit, a toll of forty shillings for every sack of wooll, and have made petition to us to release the same; we at their requests have clearly released it, and have granted for us and our heirs, that we shall not take such things without their common assent and good will, saving to us and our heirs the custom of woolls, skins, and leather, granted before by the communalty afore said. In witness of which things we have caused these our letters to be made patents. Witness Edward our son at London the tenth day of October, the five and twentieth year of our reign.

(2 Inst. 76.)

(1) *Et pur ceo que tout le plus de la comminaltie du realme seifent durement greve de la maletot des leyns. s. de chescun sacke de leyn 40. s. &c.*] The grievance was that the king had lately, without common assent of parliament, set a charge of forty shillings upon every sack of wool, here called by the name of maletot, that is, the ill toll or charge, for the word [imposition] was not yet heard of in any record.

See before the statute of Magna Charta cap. 32.

See more of this matter in the exposition upon the 30. chapter of Magna Charta.

This is an excellent precedent, that when grievances are found out, and proved, that they bee put downe and overthrowne by authority of parliament.

(2) *Et nous avons graunt pur nous et pur nous heires, que mes celes ne prendrons sans leur common assent et leur bone volonte.*] This is worthy of observation, whereof you may reade in the exposition of the 30 chapter of Magna Charta.

(3) *Avant grauntes per le comminaltie avantdit.*] By the communalty afore said, that is, by act of parliament for the communalty of England cannot graunt but by parliament.

And some say that the communalty are here named for three respects : 1. For that they are the greater part. 2. For all aids

Rot. Pat. 3 E. 1. m. & 9.

Mich. 26 E. 1.
Int' return' brev.
in Scacc'. per
communitatem
Angliæ, &c.
vid. Magna
Chart. cap. 30.
* Art. super
Chart. cap. 1.

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Rot. Pat. 3 E. 1.
ra. 1. & 9.
Rot. Finium.
3 E. 1. Acc.
Mich. 26 E. 1.
in Scacc. inter
return. brevium
ex rem. Thesaur.
See in the Ex-
position upon
the statute of
Magna Chart.
ca. 30.

and subsidies begun with them. 3. For that the farre greater benefit to the king comes from them. For in subsidies the comminalty filleth the kings coffers; but some have said that * commune and comminalty doe signify as much as the people, that is, all the subjects of the realme, and so it was taken in divers parliaments in this kings raigne, and in this also, so as commune should signify the people, and commons a part of them.

(4) *Les customes de leyues.*] The customes here intended to be granted by parliament, were 6. s. 8. d. for the transportation of a sack of wool, and 6. s. 8. d. for every 300 pelts transported, and 13. s. 4. d. for the transportation of a last of leather.

These customes were granted to king Edw. 1. as it appeareth in Rot. patent. 3 E. 1. *Cum prælati, magnates, et tota communitas regni nostri nobis concessi quendam novam consuetudinem de lanis, pellibus, et coriis tam in Anglia, quam in Hibernia, et Wallia regnum nostrum exeuntibus imperpetuum nobis, et hæredibus nostris, percipiend' in forma subscripta, viz. de quolibet sacco lanæ dimidiam marcam, de singulis trecentis pellibus lanutis quæ faciunt unum saccum dimidiam marcam, et de qualibet lasta coriorum unam marcam, illorum scilicet coriorum, pellium, et lanarum, quæ portus Angliæ, Hiberniæ, et Walliæ regnum nostrum exhibunt, &c.*

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STAT. DE TALLAGIO NON CONCEDENDO,

Edit. Anno 34 Edw. 1.

C A P. I.

NULLUM tallagium (1), vel auxilium (2) per nos, vel hæredes nostros in regno nostro ponatur, seu levetur sine voluntate, et assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgenfium, et aliorum liberorum com' de regno nostro (3).

NO tallage or aid shall be taken or levied by us or our heirs in our realm, without the good will and assent of archbishops, bishops, earls, barons, knights, burgessees, and other freemen of the land.

(25 Ed. 1. stat. 1. c. 6.)

Albeit that this act is not next in course of time, yet being next in matter, we have thought good to handle this act before others.

There were two causes of the making of this act; the first was, that where king E. 1. having conceived just displeasure against the French king, for the injury done unto him, in with-holding Aquitaine, and other his inheritance in France; and where the French king had grievously, and with strong hand vexed and over-

over-layed Guy earl of Flanders, and had won much of his lands from him: king Edw. the first intending to aid and assist the said earl, and to rescue him out of the hands of the French king, who was ready to devour him and his earldom, did require specially of Humfrey le Bohun earl of Hereford and Essex, and constable of England, and of Roger Bigot earl of Norfolk and Suffolk, marshal of England, and of all the Earls, barons, knights, and esquires, and of all free-holders of 20. l. land within his kingdom, whether they held of the king in *capite*, or of other whatsoever, to contribute to his wars in Flanders in rescue of the said earl, or finde able men to go with him on that journey: which the constable and marshal, and many of the nobility, and of the knights and esquires, and specially John Ferrers taking part with them, and all the free holders abovesaid vehemently denyed, unlesse it were so ordained and determined by common consent of parliament, as had been before enacted in the parliament of anno 25 E. 1. by the act of *confirmationes chartarum*, as before it appeareth.

The second cause was, that the king the yeer before had taken a tallage of all cities, boroughs and towns, without assent of parliament; whereupon grew great murmuring and discontentment among the commons. For pacifying of which discord between the king and his nobles, and for the quieting of the commons, and for a perpetuall and a constant law for ever after both in this and other like cases, this act was made in the four and thirtieth yeer of his reign.

(1) *Nallum tallagium.*] *Tallagium*, or *tailagium* cometh of the French word *tailer*, to share or cut out a part, and metaphorically is taken when the king or any other hath a share or part of the value of a mans goods or chattels, or a share or part of the annuall revenue of his lands, or puts any charge or burthen upon another; so as *tallagium* is a generall word, and doth include † all subsidies, taxes, tenths, fifteens, impositions, or other burthens or charge put or set upon any man, and so is expounded in our books, here it is restrained to tallages, set or levied by the king or his heirs.

* *Robertus de Haye imp^r Richardum le Waleys cum al^{is} pro cap- tione averiorum in duobus locis, apud Lindefield vocat^r Northflet & Southflet, ipsi dicunt quod Willielmus filius Walteri le Haye tenet de eo quendam ten^{entiam} apud Lindefield per servitium xi. s. & per tallagium ei faciend^{um} ad voluntatem ipsius Richardi, & quia ipsum Willielmum talliavit, anno regis nono, una vice ad ii. s. & alia vice anno decimo, ad xviii. d. quod tallagium ei aretro fuit pro prædictis ii. s. per annum, ipsum Willielmum distrinxit super feodum suum pro præd^{ictis} arveragiis: Robertus dic^{it} quod præd^{ictus} Willielmus tenuit de eo prædict^{am} ten^{entiam} per certum servitium, & non per tallagium ad voluntatem suam, & dic^{it} quod de illo servitio nihil ei aretro fuit &c. Richardus dic^{it} quod advocat prædictam districtionem super prædict^{am} Willielmum; & non super ipsum Robertum; et petit iudicium si idem Robertus, qui non est tenens suus, nec districtio super ipsum advocatur, possit servitium suum deducere: ideo considerat^{ur} est quod prædictus Richardus inde sine die. Et prædictus Robertus nihil cap^{it} per breve suum, set sit in misericordia pro falso clam^{ore} suo; et prædictus Richardus habeat retur- num averiorum, &c.*

(2) *Auxilium.*] And this word was used in the statute of 25 E. 1. whereof somewhat hath been said in the exposition thereof.

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For this word
Tallage, vide
15 E. 3. Avowry
106. F. N. B. 14.
16. 38 H. 6. 10.
32 E. 3. Monstr.
16. 3 E. 3.
Quo War. Bre.
2.
Clauf. 19 H. 3.
m. 16. 10id. m.
13. Clauf.
11 H. 3. m. 17.
Regist. 142, 143.
F. N. B. 150.
13 E. 1. Vill. 38.
Rot. Alma.
12 E. 3. part 1.
m. 22. Rot.
Parliam. 6 E. 3.
nu. 4. 1 E. 2.
Stat. de Mili-
tibus, Rot.
Parliam.
13 H. 4. nu. 14.
19 H. 6. 32.
38 H. 6. 10.
Rot. Pat. 1 H. 7.
part 3. m. 16.
Vide in Waste
Tallage de
Villens, &c.
Modus tenend.
Parli. Vet. Ma-
nuscript.
* Mich. 11 E. 1.
in banco Rot.
49. Suffex.

You

You may read further in that ancient record intituled *De modo tenendi parliamentum tempore regis Edw. filii Eteldredi*; *debent auxilia peti in pleno parlamento*. So, as hath been said before in the exposition upon the 30. chapter of Magna Charta, and of 25 E. 1. These acts are but declarations of the ancient common laws of this realm.

* Vide fol. 41.
Math Par. 247.
Walf. 40.

Fortescue, ca. 9.
fol. 13. & cap.
12. 18. 34. & 35.

(3) *Nullum tallagium, vel * auxilium per nos, vel hæredes nostros in regno nostro ponatur, seu levetur sine voluntate, et assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium, et aliorum liberorum com' de regno nostro.*] These words are plain without any scruple, absolute without any saving. *Absoluta sententia expostore non indiget.*

And this is as much as to say, that no subsidy, task, tenth, fifteenth, imposition, or other aid or charge whatsoever, shall by the king or his heirs be put or levied without the common councill of the realm, that is, by the will and assent of the archbishops, bishops, earls, barons, knights, burgesies, and others of the counties, that is to say, by grant and common assent in parliament.

Within this act are all new offices erected with new fees, or old offices with new fees, for that is a tallage put upon the subject, which cannot be done without common assent by act of parliament. And this doth notably appear by a petition in parliament in anno 13 H. 4. where the commons complain, that an office was erected for measurage of clothes and canvas, with a new fee for the same by colour of the kings letters patents, and pray that these letters patents might be revoked, for that the king could erect no offices with new fees to be taken of the people, who may not so be charged but by parliament.

Rot. Parliam.
13 H. 4. nu. 43.

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13 H. 4. fol. 16,
17.

The royall answer of the king in parliament was, that the statutes therefore provided shall be observed, which statutes were the said act of 25 E. 1. and this of 34 E. 1. &c. and accordingly judgement was also given in the kings bench, so as this point was both resolved in parliament, and adjudged by law according to these statutes; and hereby it appeareth that these were acts of parliament.

Rot. Parl. 22 E.
3. nu. 31. Rot.
Parl. 25 E. 3.

King Edw. 3. had granted to Robert Poley a new office of measuring of worsteds, with a new fee; and it was at the petition of the commons resolved in parliament to be void, and afterward revoked as void by authority of parliament; and the like law is in all like cases.

Note that the words of this branch are generall, *Nullum tallagium, &c. ponatur, seu levetur sine voluntate, &c.* and saith, *Per nos, et hæred' nostros*, but not *Pro nobis, aut ad opus nostrum*. But generally so as all tallages, burthens, or charges put upon the subject by the king, either to or for the king, or to or for any subject by the kings letters patents, or other commandement or order, is prohibited by this act unlesse it be by common consent of parliament; and note that the words are in the disjunctive, [*Ponatur seu levetur*] so as if it be set by the king, although it be not levied by him, but by a subject, as it was in the cases abovesaid, it is within the purview of this statute.

CAP. II.

NULLUS minister noster, vel hæredum nostrorum capiat blada, correa, aut aliqua alia bona cujuscunque, sine voluntate et assensu illius, cujus fuerint bona.

NO officer of ours, or of our heirs, shall take corn, leather, cattle, or any other goods, of any manner of person, without the good will and assent of the party to whom the goods belonged.

(12 Rep. 19.)

Of this branch we shall have just occasion to speak when we come to the statute of 28 E. 1. cap. 2. and therefore do purposely omit to speak of it here.

CAP. III.

NIHIL capiatur de cætero nomine, vel occasione maletot de sacco lana.

NOTHING from henceforth shall be taken of sacks of wooll by colour or occasion of male-tent.

See for Maletot 25 E. 3. cap. 6. and Magna Charta, cap. 30. and albeit it was ousted before, yet *nunquam nimis dicitur, quod nunquam satis dicitur*; by this act it is both prohibited by the generall purview, and also by this particular branch.

CAP. IV.

VOLUMUS et concedimus pro nobis et hæredibus nostris, quod omnes clerici et laici de regno nostro habeant omnes leges, libertates, et liberas consuetudines suas ita libere et integre, sicut eas aliquo tempore melius et plenius habere consueverunt. Et si
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[535] ticulo in præsentī charta contento statuta fuerint edita per nos et antecessores nostros, vel consuetudines introductæ; volumus et concedimus, quod hujusmodi consuetudines et statuta vacua et nulla sint in perpetuum.

WE will and grant for us and our heirs, that all clerks and laymen of our land shall have their laws, liberties, and free customs, as largely and wholly as they have used to have the same at any time when they had them best; and if any statutes have been made by us or our ancestors, or any customs brought in contrary to them, or any manner of article contained in this present charter, we will and grant, that such manner of statutes and customs shall be void and frustrate for evermore.

This

This containeth a restitution generall to the subjects of all their lawes, liberties, and free customes, as freely and wholly, as at any time before in the better and fuller manner they used to have the same, and this doth not onely extend to *Magna Charta*, and *Charta de Foresta*, but to all other laws, liberties, or freedoms, and free customes whatsoever.

42 E. 3. ca. 1.
simile.

But what if any act of parliament have been made contrary to any article in this act contained; this later clause, viz. *Et si contra illas*, &c. containeth a repeale of all statutes made by king E. 1. or any of his auncestors against any article in this act contained, that is to say, concerning the first chapter, *Nullum tallagium*, &c. or the second, *Nullus minister noster*; or the third, *Nihil capiatur*; or this fourth, which is most generall, *Volumus et concedimus*, &c.

Hereby it may be observed how prudent antiquity could containe much matter in few words.

C A P. V.

REMISIMUS etiam Humfredo le Bohun, comiti Hereford' et Essex, constabular' Angliæ, et Roger' Bigot comiti Norff. et Suff. marescallo Angliæ, et aliis comitibus, baronibus, militibus, armigeris, et I. de Ferreres, ac omnibus aliis de eorum societate, confederatione, et concordia existentibus: necnon et omnibus viginti libratas terre tenentibus in regno nostro, sive de nobis teneant in capite, sive de alio quocunque ad transfretand' nobiscum in Fland' certo die vocatis, rancorem (1) et malam voluntatem (2) erga nos habitam, ac etiam transgressiones si quas nobis fecerint (3), usque ad præsentis chartæ consecutionem. Et ad maiorem huiusmodi rei securitatem volumus et concedimus, quod omnes archiepiscopi (4), et episcopi in perpetuum habeant in suis cathedralibus ecclesiis, habitanti præsentis charta lecta excommunicare, et publice in singulis parochialibus ecclesiis suarum dioc' excommunicatos denunciare bis in anno omnes illos, qui contra tenorem præsentis chartæ vim et effectum quocumque modo vel articulo scienter fecerint, aut fieri procuraverint. In cuius rei testimonium præsentis chartæ sigillum nostrum est appensum una cum sigillis archiepif-

MOREOVER, we have pardoned Humfrey Bohun earl of Hereford and Essex, constable of England, Roger earl of Norfolk and Suffolk, marshal of England, and other earls, barons, knights, esquires, and namely John de Ferrariis, with all other being of their fellowship, confederacy, and bond, and also to all other that hold xx pound land in our realm, whether they hold of us in chief, or of other, that were appointed at a day certain to pass over with us into Flanders, the rancour and evil-will born against us, and all other offences that they have done against us, unto the making of this present charter. And for the more assurance of this thing, we will and grant, that all archbishops and bishops for ever shall read this present charter in their cathedral churches twice in the year, and upon the reading thereof in every of their parish churches, shall openly denounce accursed all those that willingly do procure to be done any thing contrary to the tenor, force, and effect of this present charter in any point and article. In witness of which thing we have set our seal to this present charter, together with the seals

archiepiscoporum, episcoporum, &c. (5) *qui sponte juraverunt, quod tenorem presentis chartæ, quantum in eis est, in omnibus causis et singulis articulis servabunt, et ad observationem fidele auxilium præstabunt, &c.* (6)

seals of the archbishops, bishops, &c. which voluntarily have sworn that, as much as in them is, they shall observe the tenor of this present charter in all causes and articles, and shall extend their faithful aid to the keeping thereof, &c.

If you compare our English histories with this act of parliament, the old saying shall bee verified, that records of parliament are the truest histories.

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Although the king had conceived a deep displeasure against the constable, marshall, and others of the nobility, gentry, and commons of the realme, for denying of that which he so much desired, yet for that they stood in defence of their laws, liberties, and free customes, the king, who (as sir William Herle chief justice of the common pleas, who lived in his time, and served him, said) was the wisest king that ever was, did not only restore the same to them as is aforesaid, but granted a special pardon to those of whom he had conceived so great displeasure; such a one as you shall not reade of the like, for hereby he pardoned three things:

5 E. 3. fol. 14.

(1) 1. *Rancorem.*] Rancor is taken here metaphorically for a festring of indignation, or displeasure in the minde of the king, which the king releaseth and dischargeth them of the same, and incidently restoreth them to his favour.

(2) 2. *Malum voluntatem.*] Ill will or unkindnesse: of this so much may be said as hath been said of rancor.

(3) 3. *Et etiam transgressionem, si quas fecerint.*] Here these words [*si quas fecerint*] are added, lest by acceptance of a pardon of transgressions they should impliedly confesse that they had transgressed: so carefull were the lords and commons in former times to preserve the ancient laws, liberties, and free customs of their country.

(4) *Et quod omnes archiepiscopi, &c.*] Here power is given to archbishops and bishops twice in the yeare, upon the reading of this act, to excommunicate all the violaters thereof, &c.

25 E. 1. Confirm. Chartar. cap. 4.

(5) *In cujus rei testimonium chartæ sigillum nostrum est appensum una cum sigillis archiepiscoporum, episcoporum, comitum, baronum, &c.*] Nota the solemnity of this act, in that all the archbishops, bishops, earles, barons, &c. did put their seale thereunto: a rare example, which was done for the obliging of them the more firmly to the observation of this act, which concerned the laws, liberties, and free customes of their country.

Rot. Parl. 7 H. 4. nu. 60. simile. 23 E. 1. bre. procerum, & comitat. 70. cap. sigillat. Wals. pag. 43.

(6) *Qui sponte juraverunt, quod tenorem presentis chartæ, quantum in eis est, in omnibus causis et singulis articulis servabunt, et ad observand' fidele auxilium præstabunt, &c.*] And for their greater obligation for the due observation of this act, they tooke a voluntary corporall oath.

Here note, that either houses of parliament being courts may take voluntary oathes, as here it appeareth.

ARTICULI SUPER CHARTAS,

Edit. Anno 28 Edw. 1.

PUR ceo que les points de la graund chartre, des fraunchis. et de la forest, les queux le roy Henry pier nostre seigniour le roy qui ore est, granta a son peuple (1) pour la preue de son roialme, ne ont pas este tenus, ne gardes avant ces heures, pour ceo que avant ces heures peine ne fuit establie (2) vers les trespassants cointre les points des chartres avantdits : nostre seigniour le roy les adde novel graunt, renovele et confirme. Et a la requestes des prelates, counts, et barons (3) a son parlement a West, en quaresme lan de son reign xxviii. ad certains points affirme, et poine ordeigne, et establie, encounter tous yceux, que encounter les points des avantdits chartres, ou nul point de eux, en nul manner viendront, on misprendrent, en la forme que lensuit.

FORASMUCH as the articles of the great charter of liberties, and of the charter of the forest, the which king Henry, father of the king that now is, granted to his people for the weal of his realm, have not been heretofore observed ne kept, because there was no punishment executed upon them which offended against the points of the charters before mentioned; our lord the king hath again granted, renewed, and confirmed them at the request of his prelates, earls, and barons, assembled in his parliament holden at Westminster, the eight and twentieth year of his reign, and hath ordained, enacted, and established certain articles against all them that offend contrary to the points of the said charters, or any part of them, or that in any wise transgress them, in the form that ensueth.

One cause of the making of this act was, that albeit the king had confirmed the said charters at his parliament holden in 25 E. 1. and filed the act by the name of *Confirmationes chartarum de libertatibus Angliæ et Forestæ*, yet because there was a saving in that act [*Saves les auncient aides et prises dues et accoustomes*] although they were to be understood of aids by reason of tenure, &c. as in the exposition thereof it appeareth, yet it was a colour for the kings officers and ministers to make an evasion when the parliament was: and thereupon the lords of parliament did importune the king to confirm the said charters; which the king promised to doe: but when it came to be set downe in forme of an act, the king would have added a saving of the right of his crown, which the lords did mainly inveigh against, and pressed the king with his promise to confirm them as absolutely as his noble father king H. 3. had graunted them; which in the end he yeelded unto, as by this act it appeareth.

And another cause of the making of this act, as by the preamble is suggested, was, that there was no certaine punishment in many points established by the said charters against the violaters of the same, which also by this act are remedied.

(1) *Grant a son people.*] This word *populus* here doth include all the king's subjects, both the prelates, and other of the clergy, and the nobles and commons of this realme, for all bee the kings people, [*son people.*]

(2) *Peine ne fuit establee.*] Some reade it [*peine ne fuit execut*] that is true in effect, but the originall is *peine ne fuit establee*, that is, no paine was set down in certain.

(3) *A le request les prelates, countes, et barons.*] These articles were preferred by the lords of parliament, because they had a promise of the king to passe the said articles; there were at this parliament 93. earles and barons of the realme, besides the lords of the clergy, which then were many.

The title is here *Articuli super chartas*, sometime they stiled it by the name of *Novi articuli super chartas*, sometimes, *Explanations sur les chartres*; and justly they are called *Articuli super chartas*, meaning *Magna Charta*, and *Charta de Foresta*, for that they contain the substance of all that is contained in these articles.

Rot. Parl. 5 H.4.
nu. 61. 2 E. 3. 27.
Piers de Salt,
marin. Case.
Vide h. 10. fo.
74. Le Case de
Marshalla.

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CAP. I.

CEST ASCAVOIR, que de cy en avant la grand chartre des franchises Dengleterre, grante a tout la commune Dengleterre (1), et la chartre de la forest in mesme le maner grante, soient tenus, gardes, et maintenus en chescun article, et chescun point, auxy pleinement come le roy les ad graunte, renovele, et per sa chartre confirme (2). Et que celles chartres soient baillies a chescun viscount (3) Dengleterre desoubes le seale le roy, a lier quatre foits per an devant le people en pleine countie: cest-ascavoir, au prochein countie apres la saint Michael, au prochein countie apres le Noel, au prochein countie apres la Pasche, et au prochein countie apres la saint Johan Baptist. Et a ceux deux chartres en chescun point, et en chescun article dicele, firmement tener, et garder, ou remedie ne fuit avant per la common ley, soient esleus en chescun countie per la commune de mesme la countie trois prodes homes chivalers, ou auters loialx, sages, et avises, que soient jures et assignes per les letters le roy overtes de son graund seale, de oier et terminer, sans auter briefe

THAT is to say, that from henceforth the great charter of the liberties of England, granted to all the commonalty of the realm, and the charter of the forest, in like manner granted, shall be observed, kept, and maintained in every point, in as ample wise as the king hath granted, renewed, and confirmed them by his charter. And that the charters be delivered to every sheriff of England under the king's seal, to be read four times in the year before the people in the full county, that is to wit, the next county-day after the feast of Saint Michael, and the next county-day after Christmas, and at the next county after Easter, and at the next county after the feast of Saint John. And for these two charters to be firmly observed in every point and article (where before no remedy was at the common law) there shall be chosen in every shire-court, by the commonalty of the same shire, three substantial men, knights, or other lawful, wise, and well-disposed persons, which shall be justices sworn

briefe que lour common graunt, les pleints que se ferront de tous yeux, que contreviendront (5) ou mesprendront en nul des dits points des avantdits chartres en counties ou ils sont assignes, auxibien dedeins franchises, come dehors, et auxibien des ministres le roy hors de lour places, come des auters, et les pleints cier de jour en jour sans delay : et les terminent sans allower les delays, que sont allowes per la common ley (6), et que meisme ceux chivalers eyent poyer de purier tous ceux que ser-

[539] *ront attaints de trespas fait, encountre nul point des chartres avantdits, ou remedy ne fuit avant per la common ley (4), auxy come avant est dit, per imprisonment, ou per ranfome, ou per amerciement, solonque ceo que le trespas le dimaund. Et pur ceo nentende pas le roy, ne nul des soyens que a cest ordeignement fuerent, que les chivalers avantdits, teignent nul plee per le power que done lour soit, en cas ou avant ces heures fuit remedie purview solonque la common ley per briefe : ne que prejudice soit fait a la common ley, ne a les chartres avantdits, en nul de lour points. Et voit le roy, que si tous trois ne soient presentes, ou ne ferront a tous les foits attendre, a faire lour office en la forme avantdit, que deux des trois le facent. Et ordeigne est, que les viscounts, et les bailifes le roy, soient attendants a les commandemens des avantdits justices, en quant que appent a lour office. Et oustre ces choses grants sur les points des chartres avantdits, le roy de sa grace especiall, en allegiance des grevances, que son peple ad eu per les guerres que ont este, et en amendement de lour estate, et pur tant que ils soient plus prestes a son service, et plus voluntiers aidants, quant il en avera a faire (7), ad grant ascuns articles, les queux il entend que tiendront auxibien lieu a son peple, & auxy grand profit ferront, ou plus que les points avant grantes.*

and assigned by the king's letters patents under the great seal, to hear and determine (without any other writ, but only their commission) such complaints as shall be made upon all those that commit or offend against any point contained in the foresaid charters, in the shires where they be assigned, as well within franchises as without, and as well for the king's officers out of their places, as for other, and to hear the complaints from day to day without any delay, and to determine them, without allowing the delays which be allowed by the common law. And the same knights shall have power to punish all such as shall be attainted of any trespass done contrary to any point of the foresaid charters (where no remedy was before by the common law) as before is said, by imprisonment, or by ransom, or by amerciement, according to the trespass. Nevertheless the king, nor none of those that made this ordinance, intend, that by virtue hereof any of the foresaid knights shall hold any plea by the power which shall be given them in such case, where there hath been remedy provided in times passed, after the course of the common law by writ, nor also that any prejudice should be done to the common law, nor to the charters aforesaid in any point. And the king willeth, that if all three be not present, or cannot at all times attend to do their office in form aforesaid, that two of them shall do it. And it is ordained, that the king's sheriffs and bailiffs shall be attendant to do the commandemens of the foresaid justices, as far forth as appertaineth unto their offices. And besides these things granted upon the articles of the charters aforesaid, the king of his special grace, for redress of the grievances that his people hath sustained by reason of his wars, and for the amendment of their estate, and

to the intent that they may be the more ready to do him service, and the more willing to assist and aid him in time of need, hath granted certain articles, the which he supposeth shall not only be observed of his liege people, but also shall be as much profitable, or more, than the articles heretofore granted.

(1) *A le commune d'Angleterre.*] Here *commune* is taken for people, so as [*tout le commune*] is taken here for all the people; and this is proved by the sense of the words, for *Magna Charta* was not granted to the commons of the realm, but generally to all the subjects of the realm, *viz.* to those of the clergie, and to those of the nobility, and to the commons also: and that [*commune*] in this place signifieth people, it is proved by the preamble, for there the great charter, and the charter of the forest, are rehearsed to be granted by king H. 3. to his people; and here they are said to be granted [*a le commune*:] and see before 25 E. 1. Confirmat. Chart. cap. 1. & cap. 6. for this word *commune* and *communalite*: so as [*a le commune*] here signifieth not to the commons of the realm, but to the people of the whole realm; and herewith agreeth our books, that for a common nuisance, which concerns *le commune, ou le communalite, le suite ferr' done au roy*, wherè [*commune*] and [*communalite*] include all the kings subjects. 2 E. 3. 26, &c.

(2) *Auxi pleinement come le roy, les ad grante, renovele, et per son charitre confirme.*] Here it is to be understood, that this king Edw. 1. the 28 day of March, in this 28 yeer of his reign had absolutely confirmed, so as now by force of this act of parliament in an. 34 E. 1. it hath onely the force of a charter, but this is established by this act of parliament.

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(3) *Et que les chartres sont bailles a chescun vise', &c.*] And that these charters should be read four times in the yeer in full county; here is order taken for the publishing of these charters.

See the statute de Confirmat. Chart. cap. 1. 3, 4.

(4) *Ou remedie ne fuit avant per le common ley.*] That is, where no action was given by the kings writ to be pursued at the common law.

(5) *Après le saint Michael, &c. Soient esleus en chescun countie, per la commune de mesme le countie, trois prodes chevaliers, ou auters loyals, sages, et avises, que soient jurees et assignes per les letters le roy overtes de son grand seale, de oier et terminer sans auter briefe que leur commen grant, les pleints que se ferront de tous ceux, que contreviendront, &c.*] Here, for the better execution of those glorious two lights, *Magna Charta*, and *Charta de Foresta*, a new court and new justices were appointed, with limitation that they should meddle onely with those points against those charters, for the which before this act there was no remedy by the common law.

Here by the way it is to be observed, that three new things which have fair pretences are most commonly hurtfull to the common-wealth, *viz.* 1. New courts (as here was one) for commonly they tend to the grievous vexation and oppression of the

subject, and not to that glorious end that at the first was pretended; for erect new courts, and constitute great men to be judges, and make what limitations you will, they will never want authority and jurisdiction. 2. New offices either in courts of justice, or out of them, which cannot be done as here it was, but by parliament; but they under pretence of the common good are exercised to the intolerable grievance of the subject. 3. New corporations trading into foreign parts, and at home, which under the fair pretence of order and government, in conclusion tend to the hindrance of trade and traffique, and in the end produce monopolies. But now to the text.

(6) *Et auxibien des ministres le roy hors de leur places, come des autres : et les plaintes oier de jour en jour sans delaie : et les terminent sans allower les delaies, que sont allowes par la commun ley.*] Here was the first ground for the raising of the justices of *trebasson*, or *trailbasson*, so called (in respect of their precipitate proceeding from day to day, without such convenient leisure and time as common law allowed) for that their proceedings were as speedy and ready as one might draw a staff.

Rot. Pat. 33 E. 1.
in Dorsie. m. 1.
2 E. 3. fol. 27.
27 Ail. 57. Stat.
de Ragman. Vet.
Chart. part 2.
fol. 28.
Matth. Paris.
450. Holl. 312,
313. Stare
33 E. 1.
Vet. N. B. 52.

Their authority was increased in *anno* 33 E. 1. and if you desire to read their commission, you may read the same in Rot. Pat. *anno* 33 E. 1.

They in the end had such authority as justices in eyre; but albeit they had their authority by act of parliament, yet if they erred in judgement, a writ of error did lye by the generall rule of the common law to reverse their judgement in the kings bench; which being once resolved and known, and their jurisdiction fettered with so many limitations, their authority by little and little vanished.

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(7) *Le roy de sa grace especial, &c. et pur tant que ils soient plus prestes a son service, et plus voluntiers aidants, quant il en avera a faire.*] Here is to be observed, that the subject ought to retribute to the king for a bill of grace two things, first: to be the more ready to do him service; and secondly, to aid him in time of need.

C A P. II.

EN primes pur ceo que un grande grievance (1) est en cest realme, et damage sans nombre, de ceo que le roy et ses ministres de sa meignee, auxibien les aliens come les denizens, fnt leur prises (2) per la ou ils passent parmy le realme, et pernent les biens des gents, des cleres, et des layes, sans rien paier, ou bien meins que la value (3). Ordeine est, que de cy en avant, nul ne preign' prises parmy realme, forsque les parnours le roy, et ses

SECONDARILY, forasmuch as there is a great grievance in this realm, and damage without measure, for that the king and the ministers of his house, as well of aliens as denizens, do make great prises where they pass through the realm, and take the goods as well of clerks as of lay-people, without paying therefore any thing, or else much less than the value: it is ordained, that from henceforth none do take any such prises

ses purveyours pour hostell' le roy (4). Et pur les parnours le roy, et purveyours pour son hostell', ne preignent riens, forsque pur mesme hostell' (5): et des prises que ilz feroient par my le pais, de manger ou de boire, et des auters menus necessaries pur hostell', que ils facent la paie ou gree a ceux, des queux les choses feroient prises (6). Et que tous ceux parnours le roy, purveyours, ou achatours, eient de cy en avant leur garrante ovesque eux du grand seale, ou du petite seale le roy, contenant leur poiar, et les choses dont ils feroient prises (7), au purveyance: le quel garrant ils monstrent a ceux des queux ils feroient la prise, avant ceo que ils impreignent rien (8). Et que ceux parnours, purveyours, ou achatours le roy, ne preignent plus que besoigne, et mestier ne soit (9), pour le roy et son hostell', et de ses enfantz. Et que riens ne preignent pur ceux que sont as gages, ne pur nul auter. Et que ils respoignent en hostell', ou en la garde robe pleinement de toutes leur prises, sans faire leur largesses ailleurs, ou liveries des choses, que pur le roy feroient prises (10). Et si nul parnour del hostell' le roy, per garrantie que il eit, face prises, ou liveries en auter maner, que dessus n'est dit, per plaint fait al seneschall', et au tresorer del hostell' le roy, soit la verite inquire. Et si de ceo

[542] *soit atteint, soit gre maintenant fait al pleintif, et soit ouste de service le roy pur tous jours, et demerge en prison a la volente le roy. Et si nullo face prises sans garrante, et les emporte encountre la volente (12) de celui a que les biens sont, soit maintenant arreste per la ville, ou le prise sera fait, et amene a la prochain gaole. Et si de ceo soit atteint, soit la fait de luy, come de laron (11), si la quantite des biens le demand'. Et quant as prises faire en faises, et en bons villes, et en portes*

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prises within the realm, but only the king's takers, and the purveyors for his house; and that the king's takers and purveyors of his house shall take nothing, but only for his house. And touching such things as they shall take in the country, of meat and drink, and such other mean things necessary for the house, they shall pay or make agreement with them of whom the things shall be taken. And that all the king's takers, purveyors, or catours, from henceforth shall have their warrant with them, under the king's great or petty seal, declaring their authority, and the things whereof they have power to make prise or purveyance; the which warrant they shall shew unto them whose goods they take, before they take any thing. And that those takers, purveyors, or catours for the king, shall take no more than is needful or meet to be used for the king, his household, and his children. And that they shall not take any thing for them that be in wages, nor for any other. And that they shall make full answer in the king's house, or in the wardrobe, for all things taken by them, without making their largesses any other where, or liveries, of such things as they have taken for the king. And if any taker for the king's house, by reason of his warrant, make any prise or livery, otherwise than before is mentioned, upon complaint made to the steward, and to the treasurer of the king's house, the truth shall be enquired. And if he be attainted thereof, he shall forthwith make agreement with the party, and shall be put out of the king's service for ever, and shall remain in prison at the king's pleasure. And if any make prise without warrant, and carry it away against the will of the owner, he shall immediately be arrested by the town where the prise

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was

pur la grande garderobe le roy, eient les perours lour commen garrant per le grand seale (13). Et des choses que ils prendront, eient la tefmoign' du seale du gardein de la garderobe. Et des choses issint per eux prises, de nombre, de quantite, et de value soit fait dividende entre les perours, et les gardeins des faires, maires, ou chief baylies des villes, et portes, per la vieu des merchants, des queux les biens seront issint prises. Et riens ne luy soit suffert de plus prendre, que il ne mette en dividende. Et cell' dividende soit port en garderobe sous le seale le gardein, maire, ou chiefe bailife avant-dits: et la demerge tanque sur l'acompte du garderobe le roy. Et sil soit trove que nul eit autrement prise que faire ne deveroit, soit puny sur l'acompte per le gardein de la garderobe le roy, solonq; sa deserte. Et si nul face tielx prises sans garrante, et sur ceo soit atteint, soit fait de luy come de ceux que font prises pur l'ostell' le roy sans garrante, come desus est dit (14). Et nentende mye le roy, ne son counsail, que per cest estatute rien decresse au roy de son droit des auncient prises dues et accustomes, come des vins, et autres biens: mesque en toutes pointes pleyment luy soit save (15).

was made, and shall be committed to the next gaol; and if he be attainted thereupon, it shall be done unto him as unto a felon, if the quantity of the goods do so require. And concerning prises made in fairs, and good towns, and in ports, for the king's great wardrobe, the takers shall have their common warrant under the great seal. And for the things that they shall take, it shall be testified under the seal of the keeper of the wardrobe; and of those things that they have taken, the number of the things, the quantity, and the value, shall be specified in a dividend made between the takers and the keepers of fairs, mayors, or chief bailiffs of towns and ports, by the view of merchants, whose goods shall be so taken; and they shall not be suffered to take any more than is contained in their dividend; and the said dividend shall be taken into the wardrobe under the seal of the warden, mayor, or chief bailiff aforesaid, and there shall remain until the accompt of the keeper of the king's wardrobe; and if it be found, that any hath taken otherwise than he ought to do upon his accompt, he shall be punished by the keeper of the king's wardrobe after his desert; and if any make such prises without warrant, and be attainted thereupon, he shall incur the same pain as they which take prises for the king's house without warrant, as before is said. Nevertheless the king and his council do not intend, by reason of this estatute, to diminish the king's right, for the ancient prises due and accustomed, as of wines and other goods, but that his right shall be saved unto him whole in all points.

This chapter is confirmed by 18 E. 1. cap. 2. (4 Ed. 3. c. 4. 5 Ed. 3. c. 2. 10 Ed. 3. stat. 2. c. 1. 25 Ed. 3. c. 1. 36 Ed. 3. c. 2. 12 Car. 2. c. 24.)

Seeing by many acts of parliaments the kings purveyance is limited in certain, so as the law there is certain, and without question; it shall not be impertinent nor unnecessary to learne from antiquity, how, and in what sort the kings household was in those dayes provided of victuals: certain it is, that aswell before as after the conquest, the king upon his ancient demesnes of the crown of England, had houses of husbandry, and stocks for the furnishing of necessary provisions for his household; and the tenants of those manneours did by their tenures, manure, till, &c. and reap the corn upon the kings demesnes †, mowed his meadowes, &c. repaired the fences, and performed all necessary things belonging to husbandry upon the kings demeanes: in respect of which services, and to the end they might apply the same the better, they had many liberties and priviledges, as that they should not be sued out of the court of that mannor, nor impannelled of any jury or inquest, nor appeare at any other court, but onely at the court of the said mannor, nor be contributory to the expences of the knights of the shire which serve at parliament, nor pay any toll, &c. which liberties and immunities continue to this day, albeit the originall cause thereof is ceased: now all the mannors that were in the hands of Edward the Confessor before the conquest, or in the hands of William the Conqueror, and so appeare in the booke called Domesday, are accounted the auncient demeanes of the crowne of England, and had bene the demeanes of the crown long before.

In libro rubeo scacc. cap. A quibus et ad quid fuit argenti' examinatio; you shall reade that which is very observable. *In primitivo regni statu post conquestionem, regibus de fundis suis non auri et argenti pondera, sed sola victualia solvebantur, ex quibus in usu quotidiano domus regie necessaria ministrabantur, &c.* And see the reason wherefore these provisions of victuals were changed.

And this is evident by many records, but by little and little this course of good husbandry vanished.

When the kings own provisions for the most part failed, then to supply necessary provisions, there was a continuall market kept at the court gate, where the king was better served with viands for his household, then by purveyors, the subject better used, and the king at farre lesse charge in respect of the multitude of purveyors, and the officer of this market was called *clericus mercati hospitii regis*, the clerk of the market of the kings house, so as he retaineth his name still according to the first institution, although the good end thereof ceaseth; when this market was discontinued, then purveyors started up, and the number of them dayly increased, who by the lawes and statutes of this realme ought to observe five things: 1. To take onely for the kings household. 2. With the consent of the owner. 3. For the price as was sold in the market. 4. To take no more then was necessary for the kings household. 5. Where it might best be spared, and where more plenty was.

All which was inquirable before the iustices in eyre, before our statute made in 28 E. 1. and at the first they were called *emptores*, buyers; and it was a speciall article inquired by the iustices in eyre, *de prisīs factis per vicecomites, vel constabular', vel alios balivos contra voluntatem eorum quorum catalla fuerint*; and this was before the making of our statute of 28 E. 1.

* Inter leges Canut. regis ca. 67. Omnibus hanc porro impartimus allevationē ut quo prius opprimebatur onere populum liberemus: inprimis præfatis meis omnibus mand', ut ex prædiis meis propriis quæ mihi fuerint ad victum necessaria suppeditent, neque alius quisquam victui nostro alimentum præstare invitatus cogatur. Itaq; si eorum aliquis hoc nomine molestam petierit, is proprii capitis æstimationem regi dependito.

Lucubrat.

† [543]

Rot. claus. 13 H. 3. m. 10. in dorf. Rot. finium 3 E. 1. 35 Kelwey, 114. Brit. 75, 76. Fleta, lib. 2. cap. 8. & 11.

Rot. Parl. 50 E. 3. nu. 87. & 152. 12 R. 2. cap. 4. Lib. intr' Co. 445. 32 H. 8. ca. 20. The number of purveyors enacted to be abridged. 34 E. 3. ca. 3. 36 E. 3. ca. 2. That they be sufficient men. Bract. l. 3. fo. 117. cap. 13. in' facie. Brit. fol. 53. 36. Fleta, l. 1 ca. 20. Lib. 2. cap. 16. Fortescue, c. 36. fol. 45. See the statutes hereafter mentioned.

And

Stat. de Tallagio.
54 E. 1. 4 E. 3.
c. 3. 18 E. 3. c. 7.
Int' brevia
6 H. 3. Balivus
de Hoyl and
Lenne, & Ger-
nem. 7 H. 3.
tit. Waste 141.
Pl. Com. in case
dg Mynes.

And for a conclusion hereof it is declared by authority of parliament, in these words, *Nullus minister noster, vel hæredum nostrorum, capiat blada, corea, vel aliqua alia bona cujuscunque sine voluntate et consensu illius cujus fuerint bona*: and this is confirmed and established by the statute of 18 E. 3.

So as no question can bee hereof made, and if you reade of any taking or purveyance in auncient time it must bee taken with these limitations; and the reason why these words, *sine voluntate et consensu*, &c. without the will and agreement, were expressed, was for that purveyors would take the goods of such men as had no will to sell them, but to use or spend them for their own necessary use.

(1) *En primes pur ceo que un graund grevance, &c.*] The mischief before this statute was, that the insolency of the purveyors bearing themselves so proudly under the great officers of the kings household, grew to that height that they would take what and how much as it pleased them, and many times where it might be least forborne or spared, and for others then for the kings household, and sometimes would pay nothing, and many times lesse then the true value, and many persons would make purveyance without any warrant at all; of these great grievances and losses without number, infinite damages, the subjects complained of at this parliament, and for restraining of the abuses of the purveyors and reliefe of the subjects, this act of parliament was made.

(2) *Font leur prises.*] Of the French word *prise*, comes the word *prisa*, used in law for the things taken by purveyors: *recta prisæ*, right taking or purveyance is there expounded, *viz. De uno dol' ante malum et alio post malum* * and so explained in the charter of E. 1. This is called *recta prisæ*, right taking or purveyance, because it distinguished it from the taking or purveyance against right. *Vide speculum regis M.S.* written by Isele archbishop of Cant. to king E. 3.

*Edwardus Dei gratia rex Angliæ, dominus Hiberniæ, & dux Aquitan' dilectis & fidelibus suis Henric' le Scrop' & sociis suis justic' nostris ad placita coram nobis tenend' assignat', salutem. Miramur quod cum vos præfat' locum nostrum in placitis hujusmodi teneatis, & nostram præsentiam per loca per quæ regno nostro transferitis in præmissis supplere debeatis, * de prisæ bladorum, victualium, et aliorum bonorum subditorum nostrorum, contra voluntatem eorundem, conspiratoribus, transgressoribus, informatoribus falsarum querelarum, conventiculis & confederationibus illicitis factis non inquiritis, nec ulterius facitis quod deceret: volentes igitur hujusmodi mala puniri prout decet, vobis mandamus firmiter injungentes quod de hujusmodi prisæ, conspirationibus, transgressionibus, informationibus falsarum querelarum, conventiculis, & confederationibus exnunc per singula loca per quæ transferitis, tam infra libertates quam extra, cum omn' diligentia & modis quibus poteritis inquiratis, & omnes illos quos legitime convinci contingit, puniatis juxta formam statutorum, & articulorum inde editorum, & secundum legem, & consuetudinem regni nostri in hac parte talit' vos habentes, quod querela ad nos inde non perveniat iterata. T. me ipso apud Newwarke, xxx. die Januarii, anno regni nostri 16. per ipsum regem.*

(3) *Ou bien meynes que la value.*] Hereby it appeareth that the very value ought to be paid for the things purveyed according to that which appeared in our auncient authors.

(4) *Forsqe*

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Pasch. 30 E. 1.
coram rege
Kanc.
The Cinque
ports case.
* Rot. Cha.
17 July, anno
6 E. 1. Baroni-
bus 5. Port.
concessus.

In ligul. de præ-
cept. de Term.
Hil. anno
16 E. 2. Nota
pro justic. de
banco regis &
eorum honore &
suprema juris-
dictione.
* Purveyance.
28 E. 1. Art. fu-
per Chart. ca. 2.
28 E. 1. Art. fu-
per Chart. c. 20.
Anno 33 E. 1.
de conspirat.

4 E. 3. c. 3.
25 F. 3. ca. 1.
36 E. 3. ca. 2.

(4) *Forsque le pernours le roy, et les purveyors pur le hostle le roy.]* Herewith agreeth many later statutes, and explained to be the household of the king and queene, at this parliament, cap. 5. that the chauncellor and justices of the kings bench should follow the court, and by pretext thereof purveyance was made for them as part of the household, which lasted untill 4 E. 3. cap. 3. at what time (the chauncellor and judges discontinuing to follow the court) it is provided against them, and all other that be not of the kings household.

4 E. 3. c. 3.
25 E. 3. ca. 1.
36 E. 3. c. 2.
Rot. Pat.
10 E. 2. pt. 2.
m. 20. li. 10.
fol. 73. In case
de Marshallsea.

(5) *Ne pernont riens forsque pur mesme le housholde, &c.]* All this is in affirmance of the auncient common above mentioned, and ratified by the later acts of parliament last above remembered.

(6) *Et des prises que ilz feroient per my le pays de manger ou de boyer, et des autres menus necessaries pur le hostle, que ilz facent le paie ou gree a ceux des queux le choses feroient prises.]* This is to be understood, when the king is passing in the country, as in his progresse, or in any journey, as it appeareth by the preamble; there the purveyor may take meat and drink, which this act here in respect of the kings passage calls small things, but he must pay the very value therefore, and make present payment, or agree with the party.

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This is made certaine by a latter statute, that in all cases where the thing to be taken is under 40 shillings, there present payment to be made, or else the owner may retaine and resist, and for the tryall of the true value, the thing to be taken is to be praised or priced according to the very value by the lord or his bailly, or the constable, and foure good men of the town where such taking shall be, there to be sworne, in covenable and easie manner without threats or dures and by indenture the quantity of the thing taken, the price, and of what persons; but if it be not in the kings passage, but for his standing house, then the king cannot take any beere or ale, because it is a manufacture, no more then he can take for his standing house any other visuall made by art and labour of mans hand, as bread, or the like; but mault, having the substance of the barley remaining, and having nothing added to it, is no such manufacture, as it appeareth by a later act of parliament. But then the king by his officers must convert it into beere; for he cannot sell, or otherwise employ the same, which hath been the cause that never any mault was taken, and it must be taken at the very value in the market.

4 E. 3. cap. 3.
5 E. 3. cap. 2.
36 E. 3. c. 2. &c.

(7) *Eyent de cy en avant leur garrante, ove eux du grand seale, ou de petit seale le roy, conteynant leur power, et les choses dont ils feroient prises.]* By latter statutes the commission must be under the great seal onely, and every halfe yeare to be renewed.

36 E. 3. cap. 2.

(8) *Le quel garrant ils monstrent a eux des queux ils feroient le prise avant ceo que ils impreignent rien.]* This is evident, and confirmed by later statutes.

36 E. 3. cap. 2.
2 & 3 Ph. &
Mar. cap. 6.

(9) *Ne preigne plus que besoigne et mester ne soit, &c.]* The statute of 36 E. 3. confirmeth this, and doth adde, that the takings must be in such places where greatest plenty is, and in a covenable time.

I have reade a booke called *Speculum Regis*, written in Latin by Simon Islip archbishop of Canterbury to king Edward the third, wherein he sharply inveigheth against the intolerable abuses of purveyors and purveyance in many particulars, and earnestly advi-
viseth,

Speculum Regis.

vifeth, and instantly preffeth the king to provide remedy for thofe infufferable oppreffions and wrongs offered to his fubjects, which the king keeping with him, and often perufing, it wrought fuch effect, that the king at divers of his parliaments, but fpecially at his parliament holden in the 36 yeare of his reign, of his own will, without motion of the great men or commons, as the record of parliament fpeaketh, caufed to be made many excellent lawes againft the oppreffions, malice, and falshood of purveyors.

(10) *Et que ils refpoinent in lefel ou en la garde robe pleinement de tous lour prifes fans faire lour largesses ailours, ou liweries des choses, que pur le roy ferra prifes.*] This account is to be made by this act for victuals, &c. to the houfhould, that is, to the officers of the green cloth; and for fuch things as belong to the wardrobe to the mafter of the wardrobe.

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(11) *Et si nul face prifes sans garrant, et les emport encounter le volunt de celui, &c. Et si de ceo soit attain, soit fait de luy, come de laron.*] By this branch, if any purveyor take any thing without warrant, &c. it is felony. And here it is to be obferved, that thefe words, *come de laron*, fhall be underftood of a theefe that ftealeth above the value of 12 pence; for he that committeth petit larceny is not *un laron* within this act.

Wil. the forme
of an inditement
in Lambards
Iustice of Peace
in fine libri.

(12) *Encouter le volunt.*] That is, when he takes it as the kings purveyor, pretending to have a warrant where he hath none, this is in law as againft his will, for with his will he would not have fuffered him to take it, if he had knowne he had no warrant; but if the owner knew that he had no warrant, and yet willingly fold it him, then cannot it be faid, that he carried it away againft his will.

5 E. 3. cap. 2.
25 E. 3. cap. 1.
Hol. Cronie'
fol. 39. 369.
36 E. 3. ca. 2. 4.
7 R. 2. cap. 4.
32 E. 3. tit.
Barre 259.
Stamf. Pl.
cor. 37. a.
Li. 8. fo. 146. b.
le 6 Carpent.
cafe. Hilli.
23 E. 3. coram
rege apud Ebor'
inditements de
purveyors.
Lib. 2. ca. 6, 7.

If the purveyors take any thing without praifment made by the conftables, or other difcreet men thereto fworne, or otherwife againft that itatute, it is felony, and divers purveyors in 20 E. 3. were attained and hanged for offending againft thefe lawes.

If any purveyor make any takings or buyings, or take any carriage in any other manner then is contained in his commiffion, it is felony; or if the purveyor take more then he deliver, and have not paid for that which is taken, it is felony.

And at the feffions at Newgate holden in January, anno 32 Eliz. Nichols one of the queenes purveyors was attained and hanged for offending of this law.

(13) *Et quant as prifes faits en faieres, et en bones villes, et en ports per le grand garde robe le roy, eyent les pernours lour common garrant per le grand feale.*] For the wardrobe fee Fleta.

And the letter of the law is plaine.

(14) *Et si nul face tiels prifes sans garrant, et sur ceo soit attain, soit fait de luy come de ceux que sont prifes pur le hostel le roy sans garrant, come de suis est dit.*] That is to fay, let it be done of him as a theefe.

(15) *Et nentend mye le roy ne son counsaile, que per cest statute rien decresse al roy de son droit des aucient prifes dues, et accoustomes, come des vines, et auters biens: mesque en tous points pleinement luy sont save.*] Vide 25 E. 1. confirm' chartarum, the like faving explained, and whereof this ancient prices is to be intended.

Confirm. Chart.
cap. 6.

And hereby it may appeare how neceffary it was, firft to know what belonged to the king of common right, and at the common law.

But

But to prevent all scruples by colour of this saving, the said act of parliament *de tallag' non conced'* anno 34 E. 1. was made after this act of 28 E. 1. which is a generall negative law, without any saving. 34 E. 1. de tall' non conced. c. 2.

And therefore what subsequent acts of parliament have given to the king, the same ought to be observed and kept in such manner and order as thereby is prescribed.

C A P. III.

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DES estates des seneschals, et des marshals (2); et des plees que eux devoient tener, et coment (1): *ordeine est, que desormes ne teigne plees de franktenement (3), ne de dette, ne de covenant, ne de contract des gents de people, forsque tantselement de trespasses del hostell, et dauters trespasses fait dedeins la vierge, et des contracts et covenants, que ascun del hostel le roy avera fait a auter de mesme le hostel, et en mesme le hostel, et nemy ailours (4). Et nul plee de trespass ne pledront, auter que ne soit attache (5) per eux, avant ceo que le roy isserra (6) hors de la vierge, ou la trespassse sera fait. Et les pleder' hastivement de jour en jour, issint que ils soient pledes et terminees avant ceo que le roy isserra hors des boundes de cel vierge (7), ou le trespassse fuit fait. Et si par cas dedeins les bounds de cel vierge ne poient estre terminees, cessent tiels plees devant le seneschalle, et soient les plees a la common ley. Ne desormes ne preigne ne seneschalle consurances des dets, ne dauter chose, forsque des gents del hostel avantdit, ne nul auter plee en tiend per obligac' (8) fait a le distresse le seneschalle, ou le mareschalle. Et si les seneschals, ou le mareschals rien facent encounter cest ordinance, soit lour fait tenus pur nul. Et pur ceo que avant ces heures mults des felonies faits dedeins la vierge ont esire depunies (9), pur ceo que les coroners de pays ne se ont pas entermis denquirer des tiels maners des felonies dedeins la vierge*

CONCERNING the authority of stewards and marshals, and of such pleas as they may hold, and in what manner, it is ordained, that from henceforth they shall not hold plea of freehold, neither of debt, nor of covenant, nor of any contract made between the king's people, but only of trespass done within the house, and of other trespasses done within the verge, and of contracts and covenants that one of the king's house shall have made with another of the same house, and in the same house, and none other where. And they shall plead no plea of trespass, other than that which shall be attached by them before the king depart from the verge where the trespass shall be committed; and shall plead them speedily from day to day, so that they may be pleaded and determined before that the king depart out of the limits of the same verge where the trespass was done. And if it so be that they cannot be determined within the limits of the same verge, then shall the same pleas cease before the steward, and the plaintiffs shall have recourse to the common law. And from henceforth the steward shall not take cognizance of debts nor of other things, but of people of the same house, nor shall hold none other plea by obligation made at the distress of the steward and of the marshals. And if the steward or marshals do any thing contrary to this ordinance, it shall be holden as void.

vierge (10), mes le coroner del hostel le roy, que est passant, de quoy issue nad my este fait en du manner, ne les felons mis en exigent (11), ne utlages, ne rien de ceo present en eyre, que ad eē a graund damage du roy, et a meins bone garde de la peace: ordeine est, que desormes en case de mort de home, ou office de coroner appent as viewes, et enquests de ceo faire, soit maund al coroner del pays, que ensemblement ove le coroner del hostel le roy face l'office que appent, et le metter enrolle. Et ceo que ne purra mie devant le senechal estre termine, pur ceo que les felons ne purront estre attaches, ou pur auter encheson, demurge a la common ley, issint que les exigents, utlagaries, et presentments en eyre soient de ceo faits per le coroner du pays, auxy come des auters felonies faits hors de la vierge. Mes pur ceo ne soit lessé*, que les attachments ne soient faits freshment sur les felonies faits.

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void. And forasmuch as heretofore many felonies committed within the verge have been unpunished, because the coroners of the country have not been authorized to enquire of such manner of felonies done within the verge, but the coroner of the king's house, which never continueth in one place, by reason whereof there can be no trial made in due manner, nor the felons put in exigent, nor outlawed, nor any thing presented in the circuit, the which hath been to the great damage of the king, and nothing to the good preservation of his peace; it is ordained, that from henceforth in cases of the death of men, whereof the coroner's office is to make view and enquest, it shall be commanded to the coroner of the country, that he, with the coroner of the king's house, shall do as belongeth to his office, and inroll it. And that thing that cannot be determined before the steward, where the felons cannot be attached, or for other like cause, shall be remitted to the common law, so that exigents, outlawries, and presentments, shall be made thereupon in eyre by the coroner of the country, as well as of other felonies done out of the verge; nevertheless they shall not omit, by reason hereof, to make attachments freshly upon the felonies done.

(10 Ed. 3. stat. 2. c. 2. 13 R. 2. stat. 1. c. 2. 15 H. 6. c. 1. 1 Bulstr. 208. 2 Inst. 547. 4 H. 6. f. 8. 10 H. 6. f. 13. Bro. Action sur le stat. 38. 44. 6 R. p. 12. 20. 10 Rep. 71. 4 Rep. 46. 33 H. 8. c. 12. 2 Leon. 160. 18 Ed. 3. stat. 2. c. 7.)

(1) *Des estates, des senechals, et des marshals, et des ples, que eux devoient tener et coment.*] Here in this short and effectuell preamble three things are to be observed:

1. *Des estates*, that is the extent of the jurisdiction or state of the steward and marshall, whereupon they may justly and safely stand.

2. What pleas they ought to hold, where this word (*devoient*) is observable; for this act doth restore and confine this court of the marshall to his right and just jurisdiction, and to hold those pleas which the steward and marshall ought, that is, of right ought to hold.

3. How and in what order and manner those pleas ought to be holden, expressed in this word *coment*.

Hereby it appeareth, that this act is in affirmance of the common law, and purposely made for relieving the subject against the usurpations and incroachments of the steward and marshall.

(2) *Des seneschals et marshals, &c.*] These words are general, but they are to be understood of the steward of the court of the marshalsea of the household, who is ever a professor of the common law, and not of the steward of the kings household; and the marshall is here to be understood the marshall of the household, and the marshalsea is to be understood of the household, and not of the kings marshalsea; for that belongeth to the kings bench.

(3) *Ordeine est, que ne teigne plee de franktenement.*] This is negative, absolute, and in affirmance of the common law.

(4) *Ne de dette, ne de covenant, ne de contract des gens de people, forsq; tant solement des trespasses del hostel, et deuters trespasses faits deins la vierge, et des contraitis et covenants, que aucun del hostel le roy avera fait al auter de mesme le hostel, et nemy ailours.*] Here by this act it is declared, that the said steward and marshall cannot hold plea but of three actions, viz. of debt, covenant, and trespasses: in debt and covenant both the parties must be of the kings household; in trespasses it sufficeth that one of the parties be of the kings household.

And though this act speaketh generally of trespasses, yet is it onely intendable of trespasses *vi et armis*, as of battery, or taking away of goods, and not of trespasses *quare clausum fregit*, nor of trespasses and ejectment, nor of trespasses *sur le case*, nor of detinue, nor of any other personall action, nor of any reall or mixt action, notwithstanding the generall words of the statute of 33 H. 8. as you may reade at large in the case of the * marshalsea; for particular jurisdictions derogating from the jurisdiction of the generall courts of the common law are ever taken strictly.

(5) *Et nul plee de trespasses pledront, auter que ne soit attache.*]

This is explained in the case of the marshalsea, *ubi supra*.

(6) *Avant que le roy issiera.*] Albeit the king himselfe do goe out of the bounds of the vierge for his recreation, as to hunt, with no purpose to rest, tarry, abide, or make his repose there, and his counsell and household continue where they were, this is no removing within this statute: but when the king goeth in progresse, there his household goeth with him, there the king removeth within this act.

(7) *Hors des bounds de cest vierge.*] The bounds of the vierge. See Fleta * and the Mirror, that the bounds of the vierge was 12 miles round about the kings house, so as it seemeth, that 13 R. 2. was but in affirmance of the common law. *Vide* 33 H. 8. the bounds of the kings house, or palace.

(8) *Ne nul auter plee teigne per obligation.*] This is also notably explained in the said case of the marshalsea, *ubi supra*.

(9) *Et pur ceo que avant ceux heures mults des felonies faits deins la vierge, ount estre dispunies.*] Here are to be observed, that as the actions above said determinable before the steward and marshall, are confined to the vierge; so felonies also determinable before the steward and marshall, are also confined to the vierge: and as they are limited of all the causes of actions rising within the vierge onely to three, and they not generally extending to all, but specially

Lib. 10. fol. 68.
in case of the
Marshalsea.

38 E. 3. 17. Reg.
gift. 185. & 111.
6 R. 2. action sur
le statute pl. ult.
3 H. 6. estopp.
18. action sur
lestat. 13. 7 H. 6.
30. 10 H. 6. 13.
14 H. 6. 6.
Lib. 5 E. 4. 129.
19 E. 4. 8. b.
20 E. 4. 16.
22 E. 4. 11. 16.
31. F.N.B. 241.
242. Hil. 5. Jac.
coram rege rot.
876.
33 H. 8. ca. 12.
* Lib. 10. fo. 60.
en case de Mar-
shalsea.
32 H. 8. cap. 22.
F.N.B. 241.

The case of the
Marshalsea, *ubi*
supra.

* [549]
13 R. 2. cap. 3.
33 H. 8. cap. 12.

2 H. 4. cap. 23.
9 R. 2. cap. 5.
18 E. 3. cap. 7.

Vid. le case de
Marshalsea, ubi
supra.

Stanf. pl. cor.
fol. 57.

L. 5 E. 4. 13. of
this incroach-
ment complaint
hath been made
in parliament.
8 H. 4. nu. 42.
Stanf. ubi supra.

Pasch' 12 E. 2.
rot. 280. coram
rege, the case of
William Swet-
ton, lib. 4. fo. 47.
Kath. Wroth's
case.

41 E. 3. coron.
280. 22 E. 3. 13.
19 E. 3. judgmt.
Dyer, 3 El. 188.

cially confined to certaine particular persons; so of felonies done within the vierge, the jurisdiction of the steward and marshall extend not to all, but to certaine, and those againe limited to certaine persons: for of ancient time they had generall authority, as justices in eyre, and as vicegerents of the chiefe justice of England within the vierge, at what time they held plea of all felonies within the vierge, which power is now vanished; but as steward and marshall of the court of marshalsea of the kings household, the title of their court in criminal causes was, *placita corona aulæ hospitii domini regis coram seneschallo et marischallo*, and alwayes confined to felonies done within the circuit of the kings household, the bounds whereof are made certaine by the said act of 33 H. 8. And by that act it is provided, that all treasons, misprisions of treasons, murders, manslughters, bloudsheds, and other malicious strikings, by reason whereof bloud is or shall be shed, which shall be done in any of the kings palaces or houses, &c. shall be enquired, tried, heard, and determined before the lord steward for the time being of the kings household, or in his absence before the treasurer, and controller, and steward of the marshalsea, or any two of them, whereof the steward to be one: so as these great officers and counsellors of state, the lord steward, treasurer, and controller have no jurisdiction in these criminal causes, but only within the circuit of the kings palace or house: and it is to be observed, that this court of the marshalsea of the kings house was, as bookes speak, of ancient time instituted for those of the kings house, but they have incroached beyond their true jurisdiction: and Standford saith, that the steward and marshall before the said act of 33 H. 8. might have heard and determined all felonies, &c. perpetrate within the kings palace or house.

A robbery was committed in a towne within the vierge, and this appearing to the court, yet the same was enquired of, heard, and determined in the kings bench, and so it may be before justices of oire and terminer, and justices of peace, because their jurisdiction is generall through the whole county; but of an offence within the kings palace it shall be heard and determined according to the said act of 33 H. 8. upon which act this is observable, that if a man strike in the kings palace, where his royall person is resiant, unlesse bloud be shed he loseth not his hand; but in Westminster hall, when the kings courts sit, or before the justices of assise sitting in their place, if any man strike another, though he draw no bloud, yet shall he lose his right hand, so great honour and reverence doe lawes give to the kings courts: for in judgement of law the king himselfe is alwayes present to minister justice by his judges in those courts of justice, according to his kingly office to all his subjects, *secundum legem et consuetudinem Angliæ*.

(10) *Les coroners de pays ne soient pas intermis denquirer des felonies deins la vierge.*] This is understood of felonies of the death of man; for the enquiry of that felony belongs to the office of the coroner of the vierge, and so it is hereafter in this act explained, *Office del coroner appent a vieux et enquests de ceo faire.*

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Brit. fol. 1.
Lib. 4. fol. 46,
47. ubi supra.

Hereby it appeareth, that by the common law the coroner of the county could not intermeddle within the vierge, but the coroner of the vierge, and that if he took an inditement of the death of man, it was not allowable in law; and so it is if the coroner of the kings house take an inditement of the death of man out of the vierge,

it

it is void, and *coram non iudice*. And if an inditement of the death of a man being slaine out of the vierge, be taken before the coroner of the kings house, and the coroner of the county, and so entered of record, it is insufficient, because the coroner of the kings house joyned with him, who had no authority.

(11) *Ne les felonies mise in exigent, &c.*] And yet the felony was not dispunishable; for at this time it might after the remove of the king be inquired of in the kings bench, if the bench sate in that county, or before justices of oire and terminer, &c. or if the coroner of the vierge had taken an inditement, though the king went out of the vierge, yet the inditement ought to be removed into the kings bench; for that is the center whereunto all records of that nature doe fall, and there the offence might be heard and determined.

But this act was made for more speedy proceeding, for being removed into the kings bench, there ought to be 15 dayes, &c.

Lib. 9. fol. 118,
119. Seignior
Zanchers case.

And if a murder had been committed within the vierge, and the king had removed before any inditement taken by the coroner of the vierge, the coroner of the county might have inquired of the same at the common law, *ne maleficia remanerent impunita*.

See the statute of Magna Charta, *Nullus vicecomes, constabular', coronator, vel alii baliwi nostri teneant placita coronæ nostræ*. See the exposition of that statute concerning this branch for awarding of exigents, &c.

Magna Charta,
cap. 17.

Albeit the treaty of these matters concerning the marshalsea doe properly belong to the jurisdiction of courts, yet it is pertinent to this place to say so much as served for the exposition of this chapter.

See the said case of the marshalsea thorowout, which indeed doth open the windowes of the greatest part of this act.

C A P. IV.

OUSTER ces nul common plee ne soit desformes tenus a l'eschequer, encounter la forme de la graund charter.

MOREOVER no common pleas shall be from henceforth holden in the exchequer, contrary to the form of the great charter.

(Dyer, 250. 9 H. 3. c. 11. Regist. 187.)

Here is intended the 11. chapter of Magna Charta, whereof this chapter (according to the title of *Articuli super chartas*) is an exposition; for where that chapter is, *communia placita non sequantur curiam nostram, sed teneantur in loco certo*, this chapter expoundeth the same, that from henceforth no common plea shall be holden in the exchequer against the forme of the great charter: for *curia nostra* in Magna Charta are taken collective, and include as well the exchequer as the kings bench.

2. This act maketh it without question; for admit that the court of the kings bench had been named in that chapter of Magna Charta, and this act prohibiteth that no common plea should be holden in the exchequer against the forme of Magna Charta, that

II. INST.

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is, against the forme that *Magna Charta* provideth for the kings bench: and this is also confirmed by a statute made in the reigne of E. 1. and transcribed to the exchequer under the great seale, in anno 10 E. 1. called the statute of Roteland, in these words: *Sed quia quedam placita, &c.*

Now that this was a statute, the title or stile of the act is, *Statutum novum de scaccario, aliter dictum, statutum de Roteland.* In *libro rubeo* it is called: *statutum de Roteland*, and there is a writ in the Register under the title of *brevia de statut'*, *rex thesaurario, et baronibus salutem: cum secundum legem et consuetudinem regni nostri communia placita coram vobis ad scaccarium predictum placitari non debent, nisi placita illa nos vel aliquem ministrorum nostrorum ejusdem scaccarii specialiter tangunt, &c.* which writ reciteth the words of the statute of Rutland, and in the margin of the writ is quoted *statutum de Roteland*, so as without question this act was made by authority of parliament, so as without question whatsoever pleas were holden in the exchequer, in the raigne of H. 2. when Glanville wrote, yet now by two acts of parliament their jurisdiction is limited and settled: and therefore reject a late opinion contrary to such authority, and never read nor heard of before.

The exchequer is an ancient court of record for the kings affaires, touching his rights and revenues of his crowne, and for debts and duties, and other things due to the king in the right of his crowne. Britton treating of the jurisdiction of the exchequer, saith, *A oier et determiner tous les causes que touchent nous detts, et auxi a nous fees, et les incidents choses, &c.*

^a Yet in three cases the court of exchequer hath jurisdiction of common pleas between common persons in personall actions onely.

1. Where an officer or minister is one of the parties in any personall action, because that his absence in other courts may hinder the affaires of the king in his court of exchequer.

2. Any man that is a prisoner of this court, or an accountant that is entred into his account, or any other that ought to have the like priviledge of this court of exchequer, shall not bee sued in any personall action but in this court; and the reason is, because neither of these acts of parliament take away the priviledge of any court: for then, if the party priviledged were sued in any other court, he should not in respect of his priviledge of the exchequer answer there; and therefore lest the party should be without remedy, he may commence his action personall against him in the exchequer, for statutes must be so expounded, as there be no failer of justice.

3. He that is a farmer, or indebted to the king, for the kings more speedy satisfaction of his debt or duty, shall sue his debtor by a *quo minus* in the exchequer, and this appeareth by Britton, who treating of the jurisdiction of the exchequer, saith, *Et que il est power a comister de dett, que lun doit a nous detters per ou nous puissions plus tost approcher a nostre.*

Now concerning the old court and the new court of exchequer, mentioned in 2 E. 3. and other matter concerning this court of exchequer, for that the same doe properly belong to the treaty concerning the jurisdiction of courts, we shall no further speake of it here, for that sufficient hath been said already for the understanding of this chapter.

Regist. fol. 187.
8 Eliz. Dyer,
fol. 250.

Pl. com. 208,
209.

Per Saunders.

Mirr. c. 4. de jurisdictione. Flet. li. 2. cap. 25, 26.
38 ass. p. 20.
40 ass. p. 35.
14 E. 3. seire fac.
122. 2 E. 3. 24.
25. Pl. com.
208. 320. Brit.
fol. 2. 29. 38.
^a Regist. 187. b.
Stat. de Roteland, ubi supra.
2 E. 3. 25. lib. rubeus 36.
9 E. 4. 33.
See the exposition of *Magna Charta*, cap. 11.

2 E. 3. 25.
20 E. 3. ley 52.
44 E. 3. 44.
2 H. 4. 7. 11.
3 H. 5. 6.
3 H. 6. 34.
32 H. 8. 24.
7 E. 4. 30.
11 H. 7. 29.
27 H. 8. 23.
Brit. fol. 2. Flet.
ubi supra, Dier,
2 El. 174. 3 El.
201. 16 El. 528.
Pl. com. 208.
a. b.

CAP. V.

ET dauter part le roy voit que le chauncellor et les justices de son bank (i) luy suivent, issint que il eyt tous jours pres de luy ascun sages de la ley, que sachent les besoignes (2), que veignent a la court duement delivrer a tous les foits que mestier serra.

AND on the other party, the king will, that the chancellor and the justices of his bench shall follow him, so that he may have at all times near unto him some sages of the law, which be able duly to order all such matters as shall come unto the court at all times, when need shall require.

The true causes wherefore the chancellor followed the kings court were first, that the great seale is *clavis regni*, and in the custody of the chancellor, and meet it was, that the king should have the key of his kingdome about him.

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2. That *curia cancellariæ*, was *officina justitiæ*; for in those dayes not only originall writs in *regis cancellariæ*, but all commandements upon any occasion for the safety of the realme, or the good government thereof were by writs, and passed under the great seale: and therefore necessary in those dayes, that the chancellor, having the custody of the great seale, should be about the king at all times; and this is the cause that the court of chancery cannot be adjourned.

3. The stile of the court of chancery is *coram domino rege in cancellaria*. But where some hath supposed, that at the making of this statute the chancellor held a court of equity, and that the judges in this act named attended on the king to decide matter of law, and the chancellor attended on him to decide matter of equity, it is mainly opposed, that at this time the chancellor had no court of equity, but only a court of record of ordinary jurisdiction, according to the course of the common law. Master Lambert that was a matter of the chancery, and had the keeping of the records of the Tower, and had abridged many of the principall of them (which I have seen) and was well learned, and besides a great searcher of antiquities, in his treatise of the jurisdiction of courts saith, that he could not find that the chancellor held any court of equity, nor that any causes were drawne before the chancellor for help in equitie before the time of Hen. 4. in whose dayes, by reason of the intestine troubles, seoffments to uses did first begin, as some think, or else did first grow common and familiar, as all men must agree: so he. And he that advisedly reads our ancient authors, which speak of the court of chancery, they all speak of the ordinary jurisdiction of the chancellor, but none of them of any court of equity.

Also the booke called the *Diversities of Courts*, written in the reigne of Ed. 3. treateth of the jurisdiction of the chancellor according to his ordinary power, but nothing of that which he holdeth in causes of equitie. Neither shall you find in any booke case, or reports of the law, any mention made of any court of equity before or in the reigne of H. 5. and yet all of them speake of the ordinary

Glanville, Braç.
Brit. fol. 12.
Flet. lib. 2. cap.
12, 13. Mirr.
cap. 2. § 13 &
cap. 4. de ordi-
nance, de judge-
ment & juris-
diction.
2 E. 3. 20. 10 E.
3. 59. 60. 13 E.
3. prohibet 1.
24 E. 3. 65.

26 E. 3. 61. 42
 aff. 5. 43 aff.
 35.
 * 31 H. 6. sub
 pœna, 19. & 23.
 35 H. 6. ibid.
 22. 37 H. 6. 35.
 5 E. 4. 7. 7 E.
 4. 24. 29.
 16 E. 4. 4.
 22 E. 4. 6.
 7 H. 7. 2. 14 H.
 8. 7. 9. 24. b.

power or jurisdiction of the chancellor. But in the reigne of H. 6. and E. 4. cases have been reported where the chancellor hath heard some few causes in equity by English bill, and most of them concerning uses of lands. It is true, that the chancellor said in 2 E. 3. in the court of chancery at Westminster, in Theoband de Verons case, in a case that concerned livery, which belonged to his ordinary power, that the court of chancery is a court of equity, where we grant a writ to every man that comes to demand his heritage, according to that which is found by office, &c. So he. And in that extent of equity, all the courts at Westminster are courts of equity, viz. to administer justice according to the common law; and thereupon it is said in 10 E. 3. that the chancery and the kings bench is one place or court; but here it is to be noted, that at this time, and before, the court of chancery was a settled court in a certaine place, to the great benefit and ease of the subject.

Sir Robert Parning, that was lord chancellor in 14 E. 3. and had been chiefe justice of the common pleas, would in the terme time come and sit in the court of common pleas to heare matters in law debated and resolved, when he was lord chancellor, and speak to them himselfe, as it appeareth, Hillar. 17 E. 3. fol. 14. b. & Trin. 17 E. 3. 37. b. and in both these termes Sir John de Stonore knight was chiefe justice of the court of common pleas.

Vide Rot. par-
 liament, 45 E. 3.
 nu. 8.

And Sir Robert de Thorpe knight, being chiefe justice of the common pleas, was made chancellor 26 Martii, 45 E. 3. and yet in Michaelmas terme following he sate in the court of common pleas, and spake to matters in law, Mich. 45 E. 3. fol. 12. b. Trin. 45. E. 3. 19. 22. 23. b. 24. 25. 26. 27. 28. William de Finchden then being chiefe justice of the court of common pleas.

So Sir Knivet knight, being chiefe justice of the kings bench, was made chancellor of England, 5 Julii, 46 E. 3. and in 47 E. 3. fol. 13. b. Finchden chiefe justice of the common pleas in a matter of law depending in that court said, that he would conferre with the chancellor and the justices of the kings bench, and in the end judgement was given by the advice of the chancellor (viz. Knivet) and all the judges of the realme. In 49 E. 3. 4. b. Knivet chancellor argueth a matter in law, and giveth judgement.

Also peruse all the acts of parliament printed and not printed, and you shall find none that giveth him power to hold any court of equity, where some have thought, that the statute of 36 E. 3. cap. 9. doth give the chancellor power to draw men before him for reliefe in equity, but that statute without question referreth to his ordinary power; for thereby it is provided, that if any man, that finds himselfe grieved contrary to the articles above written, or others contained in divers statutes, will come into the chancery, or any for him, and thereof make his complaint, he shall presently there have remedy by force of the said articles and statutes, without pursuing elsewhere to have remedy; that is, the party grieved shall have an originall writ in the chancery grounded upon these statutes for his reliefe, although no certaine remedy be expressed in the statutes without pursuit in parliament, which act is but a declaration of the common law, as oftentimes hath been observed before, and giveth no shadow to the chancellor of any absolute power.

If

Rot. parliament.
17 R. 2. nu. 10.

If you look into the parliament rolls: the first decree in chancery that I find made by the chancellor was in 17 R. 2. John de Wyndesore complaineth in parliament against Sir Richard le Scrope, and requireth to be restored to the manors of Rampton, Cotenham, and Westwike in Cambridgeshire, the which were adjudged and ordered to him by the king's award, then being in the possession of Sir John Lisle, and now withholden by Sir Richard le Scrope, who by champerty bought the same: briefly, the case, as in the parliament roll it appeareth, was this: upon the petition of John de Wyndesore against Sir John Lisle for the said manors, they compromitted the matter to the king's order and award; the king committed the same to the council, they hearing the same, did order and adjudge the matter in controversy for Sir John de Wyndesore under the privie seal, and sent a warrant to Arundell archbishop of Canterbury, then chancellor of England, to confirme the king's award made by advice of his council, who forthwith without more ado confirmed it by his decree, and granted an injunction under the great seal against Sir John Lisle. After Sir John Lisle by petition to the king requireth that his title to the said manors might be tried and determined as it ought by the common law, notwithstanding any former matter; the king by privie seal giveth warrant to the chancellor to make a supersedeas, which the chancellor without any sticking at it did by privie seal: after which Sir Richard le Scrope purchased the said manors: upon the deliberate hearing of the whole matter by the lords of parliament, it was resolved, that the purchase of the said manors was no champerty, and it was adjudged, that Sir John de Wyndesore should take nothing by his lute, but stand to the common law, and that Sir Richard le Scrope should goe without day.

It is thought, that this court of equity began under Henry Beauford, sonne of John of Gaunt, that great bishop of Winchester, afterwards cardinal in the reigne of Hen. 5. and in the beginning of H. 6. and increased while John Kemp, bishop of York and cardinal was lord chancellor in the 28 year of H. 6. But it increased most of all, when Cardinal Wolsey was lord chancellor of England, anno 8 H. 8. and continued untill the 21 year of the same king: of whom the old saying was verified, that great men in judiciall places will never want authority. But the jurisdiction of this court belongeth to another treatise; and therefore thus much, which was pertinent to the understanding of this branch of this act, upon this just occasion shall suffice: only thus much for the honour and antiquity of that court, you reade, that in the time of king Alfred (who began to reigne anno Domini, 872. and reigned 29 yeares and six moneths) he gave a pardon to Wulfstan, and that it was inrolled in the court of chancery, which record Wulfstan vouched.

Mirror, c. 5. § 1.
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(1) *Et les justices de son bank.*] The causes of their attendance on the king are afterwards in this chapter set downe; therefore we purposely omit to speak of this high and honourable court, but referre the same to the treatise of the jurisdiction of courts, onely this may be observed, that albeit this court and the chancery became to have certaine and settled places about one time, yet the returne of writs *coram rege* are still *coram nobis ubicunque fuerimus in Anglia*.

Flet. lib. 2. cap.
2.

(2) *Iffint que il eyt tous jours pres de luy ascun sages de la ley, que sachent les besognes, &c.]* This clause referreth to the judges of the kings bench, who are termed *sages de la ley*, and which could decide the businesse which came to the court, and duly deliver justice to all when need should be. This proveth also, that at this time the chancellour held no court of equity; for the *sages* of the law (the judges of the kings bench) were duly to deliver justice to all: and hereunto may be applyed the said booke in 10 E. 3. that the court of chancery and of the kings bench was but one place (that is) to be guided by one and the same law.

At the making of this act John Langton bishop of Chichester was lord chancellour of England: and at this time Sir Roger Brabazon knight, a man excellently learned in the lawes of the realme, was chiefe justice of the kings bench, and three other learned judges, here called *sages de la ley*, were his companions: these in Fleta and ancient records are called, *locum tenentes regis*.

See more before
in this chapter
concerning the
chancery.
10 E. 3. 59, 60.

Flet. ubi supra.
17 E. 1. coram
rege.

CAP. VI.

DESCOUTH le petit seale (1), ne
*issera de formes nul briefe que
touche le common ley.*

THERE shall no writ from hence-
forth, that toucheth the com-
mon law, go forth under any of the
petty seals.

The print that saith [*de tous les privie seales*] is not according to the record.

For the better understanding of this act, it is to be understood, that at the making of this statute, the king had three seales: first, *magnum sigillum*, the great seale; 2. *parvum sigillum*, the little or petit seale; 3. *signetum*, the signet.

The great seale is in the custody of the lord chancellour or lord keeper of the great seale; and there is a speciall officer in the court of chancery, called *sigillator*, who hath the sealing of writs, and other things that passe the great seale. *Parvum sigillum*, the little or petit seale, after this time called the privie seale: this seale is in the custody of the clerke of the privie seale, sometime called keeper of the privie seale, after called lord privie seale, of whom Fleta saith thus, *Custodi sigilli privati asscientur clerici beneficii, et circumspetti domino regi jurati, qui in legibus et consuetudinibus Anglicanis noticiam habeant plenierem, quorum officium sit supplicationes et querelas conquerentium audire et examinare, et eis super qualitatibus injuriarum consensarum debitum remedium exhibere per brevium regis*. By this ancient writer three things are to be observed:

1. That the clerkes, associates to the keeper of the privie seale, are those that we now call the masters of requests, *magistri à libellis supplicum*, whose office is here lively purtrayed out, *viz. quorum officium sit supplicationes et querelas conquerentium audire et examinare*.

2. Of

2 E. 3. cap. 8.
rot. passim.
50 E. 3. nu. 10.
11 R. 2. cap. 11.
12 R. 2. cap. 2.
cap. 11. Flet.
lib. 2. ca. 13.

2. Of what quality ought these matters of the requests to be? They must have three qualities: 1. they must be *honesti et circumspēti*: 2. *domino regi jurati*: 3. *qui in legibus et consuetudinibus Anglicanis notitiam habeant pleniorē.*

3. To what end did they heare and examine the matters contained in these petitions? *Ut eis (id est) conquerentibus super qualitatibus injuriarum ostensarum debitum remedium exhibere per breve regis.* So as their office was, that being learned in the law, they should direct such as petitioned to the king, to take their remedy by the kings writ, that is, by originall writ in the chancery. And hereby it appeareth, that this act is but in affirmance of the common law; for no writ before this act could have been sealed by the privie seale.

Sigillum regis generally spoken is the great seale; and so is Bracton to be understood, where he saith, *si aliquis accusatus fuerit vel convictus, quod sigillum domini regis falsaverit, consignando inde chartas, vel brevias, &c. pro voluntate regis judicium sustinebit.*

And the Mirror yet more plainly, *Inter les exceptions al poiver del judge; si le commission (i. le brieve) ne soit seale del seale le roy de sa chancery, car al privie seale le roy, &c. ne auter forsque solement al seale, que est assigne dēe conue de la cominaltie del peple, et noisnement en jurisdictions et breves originale, n'estoit a nul obeyer, &c.* And in another place he saith, *Et issint ordeineront nous auncients un seale, et un chancellour pur le garder, et pur doner briefes remediels a tous sauns danger, &c. per cel seale solement est jurisdiction assignable a tous pleintives sans diffcultie, &c.*

There are fourē clerkes of the privie seale, who give their attendance on the lord privie seale: the principall office and charge of the lord privie seale and of his clerkes is about such things as passe by bill signed, and are to goe to the great seale: of this you may reade in the statute of 27 H. 8. cap. 11. & lib. 8. fol. 18. *in casu principis.*

(1) *Desouth le petit seale.*] This act saith not, that all writs which concerne the common law shall passe under the great seale; but no writ shall passe under the privie seale which touch the common law: for it is to be knowne, that the courts of the kings bench and the common pleas had at the making of this statute severall seales, whereby they sealed judiciall writs: as the seale belonging to the court of kings bench is in the custody of the chief justice; and so likewise the seale belonging to the court of common pleas is in the custody of the chiefe justice of that court; and the seale belonging to the court of exchequer is in the custody of the chancellour of that court. *Ad cancellarium scaccarii pertinet custodia sigilli regis. Officium cancellarii est sigillum regis custodire, simul cum corrotulis suis pro proficis regni.* And these seales are incidents inseparable to the said courts for the sealing of all judiciall writs, &c. which, for administration of justice distributive to all men, are respectively under the said seales, and without which the courts cannot administer justice: and therefore the profits coming of these seales have been letten and demised of ancient and later times, but the seales themselves were never demised, or letten, nor could be, nor any other keeper appointed to be keeper of them, then hath been time out of mind.

No *essoine de servitio regis* can be warranted by the king under his privie seale, nor protection granted under the privie seale, but

3 M 4

both

Braet. lib. 3. fol. 119.
Brit. fo. 12. b. acc.

Mirr. cap. 3. cap. Except al poier de le judge. cap. 4. Ordinance de judgement.

Lib. 2. fol. 17.
Lanes case. Oc-kam. cap. de officio cancellarii. Flet. li. 2. c. 25. Rot. pat. an. 24. E. 3. part. 2. m. 12. ibid. 30 E. 3. part 3. m. 12.

34 H. 6. 1.
35 H. 6. 2.
Lib. 11. fo. 92.
in le countee de Devons case.

both of them under the great seale, because they tend to the great delay of justice, if they be not duly obtained: and therefore the law doth require the great seale in these cases. But a warrant of the king under the privie seale to issue out mony out of his coffers is sufficient; because it concerneth but a chattell in possession. And in matters of small moment, and which can work no delay to the subject, the privie seale is sufficient; as to grant a *superfedeas* of a proceſſe in the kings owne case, or to grant a *nisi prius* where the king is party, or to allow a plea against the king, to cancell a recognizance made to the king, to discharge a debt, or the like.

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At the making of this statute the king had another seale, and that is called *signetum*, his signet. This seale is ever in the custody of the principall secretary. And there be foure clerkes of the signet, called *clerici signetti* attending on him. The reason wherefore it is in the secretaries custodie, is, for that the kings private letters are signed therewith. Also the duty of the clerk of the signet is to write out such grants or letters patents as passe by bill signed (that is, a bill supericribed with the signature, or signe manuell, or royall hand of the king) to the privie seale, which bill being transcribed and sealed with the signet is a warrant to the privie seale, and the privie seale is a warrant to the great seale. Such was the wisdom of prudent antiquity, that whatsoever should passe the great seale should come through so many hands, to the end that nothing should passe that great seale, that is so highly esteemed and accounted of in law, that was against law, or inconvenient; or that any thing should passe from the king any wayes, which he intended not, by undue or surreptitious meanes.

F.N.B. fol. 85.
2.

And of the signet the law in some cases taketh notice; for a *ne exeat regnum* may be by the kings writ under the great seale, or by commandement under the privie seale, or under the signet; for in this case the subject ought to take notice as well of the privie seale and signet, as of the great seale: for this is but a signification of the kings commandement, and nothing passeth from him. But a warrant under the privie signet to issue any treasure is not sufficient, but there it ought to be either under the great or privie seale. The mischief before this act was not concerning writs under the signet; for that was not attempted, but under the petit or privie seale, which this act ousteth as a thing done against *Magna Charta*, cap. 29. where it is said, *nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terræ*. And to grant writs under the privie or petit seale was *contra legem terræ*.

Hill. 1 E. 4.
rot. 14. indors.
in Scaccario,
Petilians case.
Lib. 11. fo. 92.
in le countee de
Devons case.
Vid. 42 E. 3.
ca. 3.

CAP. VII.

LE constable du chastele de Dover
 (1) ne plede desormes a la port
 de chastele nul plee ferreine du countie,
 que ne touche la gard du chastele. Et
 le dit constable ne disfreiner (2) les
 gents du cinque ports, a pleader ailours
 ne en auter manner que ils devoient,
 selonque la forme des charters que ils
 ont des royes, de leur franchises aun-
 cients affirmes per le grand charter.

THE constable of the castle of
 Dover shall not from henceforth
 hold any plea of a foreign county
 within the castle gate, except it touch
 the keeping of the castle. Nor shall
 the said constable distrain the inhabi-
 tants of the cinque ports to plead any
 elsewhere, nor otherwise, than they
 ought after the form of their charter
 obtained of the king for their old
 franchises confirmed by the great
 charter.

(Regist. 135.)

(1) *Constable du chastele de Dover.*] It is to be knowne, that he that is the constable, or lieftenant, or keeper of the castle of Dover, is also the warden of the cinque ports. And the kings writs directed to him, are directed, *Rex, &c. B. constabulario castri sui de Dover, et custodi quinque portuum suorum.* But he is commonly called lord warden of the cinque ports. The cinque ports be, Hastings, Dover, Hithe, Rumney, and Sandwich, whereunto Winchelsey and Rye (as most of note) and other townes be adjoynded. F.N.B. 240. b.

The constable of Dover and lord warden hath two jurisdictions, viz. 1. the authority of an admirall; and the speciall charge is committed to one that is not onely of great prowesse, wisdom, and experience in military knowledge, and specially in sea-service; but also of approved trust and loyalty, because, in regard of their situation, they require the vigilant care of their particular admirall, and his residence thereupon, in respect of the danger of the invasion of enemies by reason of the narrowness of the sea there, and that this realme was never conquered by any enemy, but landing at one of these five ports; as by the Roman at Regist. fol. 132.
F.N.B. 240.

and by the Norman at Hastings. But with this jurisdiction our statute dealeth not withall,

2. This constable of the castle of Dover mentioned in our act hath a jurisdiction to hold plea by bill concerning the guard of the castle, &c. according to the course of the common law, and of this jurisdiction doth our statute speak.

And it is to be knowne, that of such things, whereof the constable of Dover and lord warden hath jurisdiction, he is the immediate officer to the court, and, as it hath been said, writs shall be directed to him, as in all reall actions &c. for land within the cinque ports. And true it is, that they of the cinque ports have great liberties and privileges, in respect of their necessary attendance in the ports for the defence and safety of the realme: but yet the cinque ports are not exempted out of the county, for divers causes:

1. The

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Braet. lib. 5. fol.
 411. b. Flet. lib.
 6. cap. 36.
 49 E. 3. 24.
 12 E. 4. 17, 18.
 1 E. 3. 1. b.
 30 H. 6. 5.
 1 E. 4. 10.
 21 E. 3. 49.
 F.N.B. 132.
 33 E. 3. Jurisd.
 60. 11 R. 2.
 brev. 636.

Trin. 42 Eliz.
coram rege in
appeale.
19 H. 6. 1, 2.

Vide a notable
Record, Pasch'
30 E. 1. coram
rege, Kanc'.

50 E. 3. 5.

9 H. 7. 12.
33 H. 6. 33.
39 H. 6. 21.
12 E. 4. 16.
45 E. 3. jurif.
53 40 E. 3. 24.
49 E. 3. 24.
50 E. 3. 5.
14 H. 4. 20.
Braet. lib. 5. fol.
411. Flet. lib. 6.
cap. 36. Dyer,
23 El. 376.
30 H. 6. 6.
49 E. 3. 24.
33 E. 3. jurifd.
60. diversity des
courts. cap.
5. Ports.
Brook, Cinque
ports 25.
30 H. 6. 6.
Pl. com. 37. b.

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See the termes
of the law, verb.
cinque ports.

1. The constable of Dover hath no generall jurisdiction within the cinque ports, but it is limited; for example, if a man be murdered in any of the cinque ports, the wife shall have an appeale against the murderer directed to the sherife of the county, and he shall execute the writ within the cinque ports, for the constable hath no jurisdiction to hold plea thereof, as it was resolved, Trin. 42 Eliz. in an appeale brought by Dorothy Waes against Baynes, for the murder of her husband at Feversham in the county of Kent. And so it is, if he be *in custodia marescalli*, the appeale may be brought by bill against him for murder in any of the cinque ports. Also if the constable of Dover hold plea of a forraigne plea, contrary to the purport of this statute, an action upon the statute doth lye against him, and the writ may be directed to the sherife of the county, and he may serve it within the cinque ports.

2. If a stranger doth trespass, &c. in the cinque ports, &c. the suit shall be by writ, lest the trespass should be punishable.

3. If a *præcipe* be brought against one for land within the cinque ports, and he appeare and plead to it, and judgement be given against him in the court of common pleas, this judgement shall bind him for ever; for the land is not exempted out of the county, and the tenant may wave the benefit of his priviledge.

4. The priviledge extendeth not but to certaine particular townes, whereof the kings courts cannot judicially take notice.

But otherwise it is of a judgment given in the common pleas in a *præcipe* of lands that lye in any of the county palatines of Chester, Lancaster, and Durham; for they are exempted from the jurisdiction of the kings courts, and within them are *jura regalia*, and plenary jurisdiction, and so knowne to the kings courts: for they take notice of all the counties of England, because they be immediate to them for direction of writs: and therefore although the tenant doth admit the jurisdiction of the court in those cases, the judgement against him for many of such lands is void. And thus are the doubts in some books in this and other like cases fully resolved.

It is further to be understood, that the maior and jurats of the severall cinque ports have power to hold pleas, &c. and upon their judgement no writ of error out of the chancery doth lye returnable in the kings bench, nor writ of false judgement returnable into the court of common pleas: but by the franchise and custome of the cinque ports such an erroneous judgement shall be by bill, in the nature of a writ of error, examined *coram domino custode seu gardiano quinque portuum, apud curiam suam de Shipwey*. And if the judgement be erroneous, it shall be reversed by the warden of the cinque ports, and the maior and jurats shall be fined, and the maior removed from his place, and yet the court is a court of record.

And this kind of jurisdiction could not begin by letters patents, but by parliament. And I find in the book of Domesday of the liberties and franchises granted to the cinque ports, as granted in the reigne of king Edward the Confessour.

And this manner of reverfing of a judgement, and the judgement thereupon, is the onely phenix of the law for three respects:

First, that a judgement in a court of record shall be reversed or affirmed without the kings writ purchased out of the chancery.

Secondly,

Secondly, that they being judges of record shall be fined, where in a writ of false judgement the suiters shall be but amerced.

And thirdly, that the maior that gave the judgement shall be removed from his place. But our act extends only to courts holden before the constable in our act mentioned, and not to the court holden before the maior and jurats. Rot. cart. 1 Johan. part. 2. m. 12. 2. Johan. m. 51. Rot. clauf. 8 H. 3. & 10 H. 3. in dorf. m. 18. Pasch. 9 E. 1. *coram rege* Kanc' Rot. 35. Rot. Parliam. 18 E. 1. fol. 6. Hill. 21 E. 1. rot. 4. Pasch. 21 E. 1. fol. 4. Rot. Vasc. an. 22 E. 1. nu. 2, 3, 7. 13. Rot. clauf. 23 E. 1. Rot. pat. 34 E. 1. m. 25. Rot. parliam. 13 E. 3. nu. 11. Pat. 33 E. 3. m. 6. Rot. brevium, 1 E. 3. part. 1. Rot. clauf. 10 R. 2. bis. Rot. clauf. 8 H. 6. m. 15.

He that desires to reade more of the liberties and priviledges of the cinque ports, he may reade the records (amongst many others) next before cited.

(2) *Et le dit constable ne distreinera, &c.*] This branch is evident; and therefore without further exposition, with one record of parliament I will conclude this chapter.

The commons of the county of Kent complained against the officers of the castle of Dover, for arresting them by their catchpoles to answer before them, whereunto they were not bound. The answer hereunto was, that the officers should have no jurisdiction out of the fee of the honour and castle of Dover, nor should make no processe by *capias* out of the liberties of the cinque ports.

Rot. parliament, nu. 135.

C A P. VIII.

LE roy ad grant a son people, que ils eyent election de leur viscount en chescun countie, ou viscount nest my de fee, s'ils voilent.

THE king hath granted unto his people, that they shall have election of their sheriff in every shire (where the shirvalty is not of fee) if they list.

(9 Ed. 2. stat. 2. 14 Ed. 3. stat. 1. c. 7.)

Of ancient time before the making of this act such officers or ministers as were instituted either for preservation of the peace of the county, or for execution of justice, because it concerned all the subjects of that county, and they had a great interest in just and due exercises of their severall places, were by force of the kings writ in every severall county chosen in full or open county by the freeholders of that county: as before the institution of justices of peace there were *conservatores pacis* in every county, whose office (according to their names) was to conserve the kings peace, and to protect the obedient and innocent subjects from force and violence. These conservators by the ancient common law were by force of the kings writ chosen in full and open county *de probioribus et potentioribus comitatus*, &c. by the freeholders of the county; after which election so made and returned, then in that case the king directed

Vid. inter leges Sancti Edwardi, Lamb. fol. 136. Hovenden annal. cap. 35. F.N.B. 163. k.

Rot. pat. an. 5 E. 1.

This Bretun was
lord of the man-
nor of Wiching-
ham in Norff.

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Regist. 177.
F.N.B. 163. k.
4 E. 4. 44.
F.N.B. 164. c.
Regist.

3 E. 2. Linc. de
Vicecom. 14 E.
3. cap. 7. 23 H.
6. ca. 8. 12 R. 2.
ca. 3. Fortescue,
ca. 24. & 26.
W. 1. cap. 5.

Sherife.

directed a writ to the party so elected. *Edwardus Dei gratia rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ, dilecto et fideli Johanni de Bretun salutem. Cum vicecomes noster Norff. et Cōitas ejusdem comitatus elegerunt vos in custodem pacis nostræ ibidem, vobis mandamus quod ad hoc diligenter intendatis, prout idem vicecomes vobis scribi faciet ex parte nostra, donec aliud inde præceperimus. In cujus rei, &c. datum, &c. apud Cestr'. 2. die Sept. anno regni nostri 5.* And so it was then, and yet is of coroners to be chosen in full and open county by the freeholders of the county by force of the kings writ: and though the words of this writ be *de assensu comitatus*, and of the other, *per communitatem ejusdem comitatus*, and by this act, by the people, yet ought the election to be by the freeholders of the county: and so it was then, and yet is of the knights of the shires for the parliament, and of the verderors of a forest.

And likewise it was of ancient time of the sherife of the county, and restored by this act to the freeholders of the county; but this is altered by divers acts of parliament, *viz.* the act of 9 E. 2. *Lincoln de vicecomitibus*, 14 E. 3. 12 R. 2. and 23 H. 6. The knights and burgeses of parliament were then, and yet are eligible as daily experience teacheth. Now because that these and others were eligible, the statute of W. 1. provideth, that elections should be freely and duly made without any disturbance, as by that act appeareth. See hereafter cap. 13.

But I could not let passe a resolution of all the judges of England in 34 H. 6. which grew upon this occasion upon a reference by the kings privie councill to Sir John Fortescue, and Sir John Prisot chiefe justices, and to the rest of the justices concerning a sherife constituted by the king himselve, it is thus in the councill booke recorded, 3 *Martii anno* 34 Hen. 6. as followeth in these words:

Upon a demaund that my lord chancelor made to the chiefe juges, and to the remnant of the juges, howe that the kings lawes, neyther justice might not be executed in Lincolnshire, bycause ther was no sherrie there, and that the kinge by his letters patents under his great seale had deputed certaine men for to have be sherrie there? what them seemed should be doon in this behalfe. So that the kings lawes and justice might ben executed in that shire, as it is executed in other shires of England.

The ij chiefe justices the same day came unto my lords of the kings counsil in the sterred chamber, and upon the abovesaid demaund sayde, that them semed, and so it semed unto the remnant of the juges, that the king did an errour, when that he made another person sherrie of Lincolnshire then was chosen and presented unto his highnes after the effect of the statut in such behalfe made.

And though that he that so was made sherrief wolde not take it vpon him, ought not to be so punished, and to make also great a fine for his disobedience, as that yif he had be one of the iij. persons that were chosen to be sherrie after the teneur of the statute.

And furthermore them semed, that the king should have recours to the three persons that were chosen after the teneur of the statut, and make one of hem sherrief by letters patents beringe date ether at the day of the election of hem, or els at Michelmass.

And

And though that sithence the said election any of hem have gete him an exemption, that he should not be made sherrie, yet them semeth that he should be charged to take the said office vpon him.

And furthermore them semeth, that yif none of the said iij. persons chosen be made, that then some other thrifty man dwelling in a foreine shire be entreted to occupie the said office for this yeare. And the next yeare, that in eschuing of such inconveniences, that the order of thestatut in such behalfe made be observed and kept.

To the king our souereigne lord, and to the lords spirituell and temporell of his most noble counsaill.

Besechith mekely your humble liegeman John Tempest knight, to graunt your letters under your prvie seale to be made in forme following, and he shall pray to God for your most noble estate.

Henry, &c. To the tresorer and barons of our eschequer. Forasmuch as our trusty and welbeloued John Tempest knight, by us ordeyned and deputed to be sheriefe of Lincolnshire for this yere, hath for certaine causes for him alledged vtterly refused to take vpon him the charge of the said office, without that it like vs so to puruei for him, that he take no losse in the said office, like as we haue doon now in late yeeres for othir that haue ben sherieffs of the said shire. We considering the hurts and manifold inconveniences that should ensue not only to us, but also to our subgites, namely, in letting of their suites at commune law, if the said shire should long stand destitute of a sheriefe; wol and by thadvice of our counsaill haue graunted to the said John, that he shall occupie the said office by approwment, and so accompte for this yere. And therefore we charge you, that in his accompt that he shalbe to yeilde unto us bycause of his said office, ye charge him not with the hoolle extent of the said shire, that is to say, of thees twoo fermes called *de reman' firmæ com' post terras dat'* and *firma com' numero*. And also of thees particular prouffites, called *de firmis balliworum*, *auxilium vic'*, *francipleg'*, *certi fines*, issues, prouffites, nor none othir things by him to be reised by vertue of the sommons of the pipe, or of the grenewex in the said shire, saue onely of such parcelles as he with his true diligence shall arrere and gader. And that of all the remenant that shall come and grow vnto us of the said shire, ye vtterly and clerely discharge and acquite the said John Tempest knight sheriefe aforesaid by his othe, or by th'othe of his deputy sufficient accompting for him, withouten any issue, tryall, or auerrement betwix vs, and him to be had therein. Yeuen, &c.

T. Cant.

W. Ebor.

T. London.

J. Lincoln.

R. York.

R. Salisbury.

R. Sancti Johannis.

Stourton,

W. Faucomberge.

XIX. die Novembris, an. 34. apud Westm' in camera stellata rex Indorūament.
de avisamento consilii voluit, et mandavit, quod custos privati sigilli
sui literas sub eodem sigillo fieri faceret secundum tenorem infra scriptum
dominis se subscribentibus, ut patet attent' ut Henricus Ratford

†

qui

qui fuit vicecomes anno præterito ejusdem com', et nonnulli alii vicecomites retroactis temporibus eodem modo habuerunt, et occurrerunt.

T. Kent.

Which abovesaid unanimous opinion, being the advised resolution of two such famous chiefe justices, and of all the judges of England, and finding it in the counsell book, I thought fit to be published in such words, as it is there set downe, as a sure and just exposition of the statutes concerning the making of sherifes.

C A P. IX.

LE roy voet et commaund, que nul viscount, ne bailife, ne mitte en enquest, ne in juries plus des gents, ne auters ne en auter manner que il nest ordeine per estatute (1), et que ils mettent en tiels enquest (2) et juries le plus prochaines (3), le plus suffisants, et meynes suspicuous. Et que auerment le ferra, et de ceo soit attaint, rend' al plaintife ses damages au double (4), et soit en la greve mercie le roy.

THE king willeth and commandeth, that no sheriff nor bailliff shall impanel in inquests nor in juries over many persons, nor otherwise than it is ordained by statute; and that they shall put in those inquests and juries such as be next neighbours, most sufficient, and least suspicious. And he that otherwise doth, and is attained thereupon, shall pay unto the plaintiff his damages double, and shall be grievously amerced unto the king.

(1 Inst. 158. a. 34 Ed. 3. c. 4. 42 Ed. 3. c. 11. Regist. 178, 179, 180. 13 Ed. 1. stat. 1. c. 38.)

1. part Institut.
sect. 234.

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Of the antiquity and right institution of the tryall by 12, and of the number of 12, &c. See the first part of the Institutes.

(1) *Ordeine per lestatute.*] That is, by the statute of W. 2. cap. 38. See the statute of 21 E. 1. *Vet. Magna Charta* 87. and see before in the exposition of the statute of W. 2. cap. 38.

(2) *Enquest.*] This act doth extend to all enquests *ex officio*, or for tryall of an issue between the king and the subject, or between party and party, also to all suits or proceedings, either criminall or civil, real, personall, or mixt, publike or private, grand or petit, assises or enquests.

Vid. 7 E. 3. 26.
Bis. 8 E. 3. 30.
Regist. 178, 179.
180. Fortescue,
cap. 27. F.N.B.
165. a and 166. d.
Ib. 8. fol. 118.
Bonhams case.
See the first part
of the Institutes,
sect. 234. W. 2.
cap. 38. Magna
Charta, cap. 29.
Regist. 186. &
187.

(3) *Le plus procheine, &c.*] If the purview of this act were well executed, then were the right institution of tryall by juries observed; for then every juror must have two moists, and one least, *viz.* most neere, most sufficient, and least suspicious. See the Register, and F.N.B. how the party grieved may have remedy upon this statute, and that in writs of assise, attaints, and other actions, where there be juries at the first day, or when a *venire fac'* is awarded to the sherife to returne a jury, the demandant or plaintife, the tenant or defendant may have a writ to the sherife to returne jurors according to this act, and if he doth not accordingly, an attachment lyeth against him. And where the party plead to

issue,

issue, and suffer the jury to be sworne, or challengeth them, and tried indifferent, and passe against him; it is said, that he hath no remedy, but first to reverse the judgement by writ of attainr, and then to take his remedy upon this statute. But see the statutes of 20 E. 3. cap. 6. and 34 E. 3. cap. 4. 42 E. 3. cap. 11. & 4 E. 3. cap. 11. & 5 E. 3. cap. 10.

(4) *Ses damages au double.*] That is double the value of the land, debt, damages, or other thing that he lost, or was barred of by reason of that verdict.

C A P. X.

EN droit des conspirators (1), faux enformers (2), et malveyes procurers (3) des douzeins (4), enquests, assises, et juries, le roy ad ordeine remedie as plaintiffes per briefes de chancelarie. Et jademeins voet le roy, que les justices de lune bank et de lautre, et justices dassises prend' assignes, quant ils veignent en pais a faire leur office, de ceo facent leur enquests a chescun pleint sans briefe, et sans delay facent droit as pleintiffes.

IN right of conspirators, false informers, and evil procurers of dozens, assises, inquests, and juries, the king hath provided remedy for the plaintiffs by a writ out of the chancery. And notwithstanding, he willeth that his justices of the one bench and of the other, and justices assigned to take assises, when they come into the country to do their office, shall, upon every plaint made unto them, award inquests thereupon without writ, and shall do right unto the plaintiffs without delay.

(Kel. 81. Regist. 188. Rast. 123, &c.)

(1) *Conspiratours.*] These are described by the statute of 33 E. 1. Definitio de conspirat. 33 E. 2.

(2) *Faux enformers.*] These are to be understood of imbracers, and under-hand instructers, and leaders of jurors returned, and albeit the matter which he enformeth be true, yet is he a false informer, because he doth it in an undue and unjust manner.

Vet. Mag. Chart. 90. b.

(3) *Malveys procurors.*] That is understood of such as use to packe juries by nomination, or other practice, or procurement.

(4) *Douzeins, duodez in leets, &c.*] Note here this law beginneth with the inferiour, as douzeins in leets, and therefore the makers of the act doe particularize the rest, viz. inquisitions, assises, and juries.

F.N.B. 116. 2.

(5) *Le roy ad ordeins remedie per briefe de chancelarie.*] The ordinance here mentioned, whereby a writ is given against conspirators (which writ was framed per Gilbertum de Rowberie clericum de concilio domini regis, and allowed by authority of parliament) was enacted at the parliament holden an. 21 E. 1. Rot. 2. which ordinance you may reade in *Vet. Magna Charta*. But there it is set downe to be made in 33 E. 1. where in truth it was made in 21 E. 1. which error there, and the mistaking of Richard Tottell the printer, in quoting 33 E. 1. to this branch (as if the makers of this act had been indued with a propheticall spirit) would in the next impression be amended.

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This Gilbert de Rowberie was one of the kings justices of his bench, as hereafter shall appeare. Vet. Mag. Chart. 111.

This

Regist.
F.N.B. 114,
115. &c. Stamf.
pl. cor. 172. &c.

27 aff. p. 59.
24 E. 3. 34.

43 E. 3. confp. 11.
4 H. 5. judgem.
220. Stamf. pl.
cor. 175. 198.
lib. 9. fol. 56.
Poulters case.
5 E. 3. cap. 10.
34 E. 3. cap. 8.
38 E. 3. cap. 12.
41 E. 3. 15.
Coram rege apud
Linc. Hil. 29 E.
1. rot. 19.
Secundum ordi-
nationem regis,
1. 21 E. 1. ubi
supra.

Gilbert de Row-
bery.
F.N.B. fol. 116.
K. 3 E. 3. 19.
8 E. 3. 18.
11 H. 4. 2.
22 R. 2. bre' 88.
18 E. 4. 1.
24 E. 3. 34.
Vid. 22 E. 3. 1.

This ordinance was but in affirmance of the common law; for the writ of conspiracy was maintainable both in cases criminall concerning life, and civil, as it appeareth in the Register and F.N.B. and plentifully in our bookes: and in cases concerning life, if the conspirators be indited and convicted at the kings suit, judgement villanous shall be given against him, but not at the suit of the party, which judgement is by the common law; for it is given by no statute.

(6) *Et jademaines voit le roy que les justices de lun bank et l'auter, &c.*] See the statutes of 5 E. 3. 34 E. 3. 38 E. 3. &c. by the which this statute is enlarged as to the justices. And a notable case in 41 E. 3. in expounding of these statutes, and upon like reason this act concerning the proceeding by bill, according to the words of this branch, *sans brieve, et sans delay.*

In the next yeare after the making of this act, which was in the 29 yeare of E. 1. William de Welbye brought an action by originall writ of conspiracy, returnable in the kings bench against William of Hemswell, parson of the church of Newton, and John of Malden, parson of the church of Askerbye, *secundum ordinationem regis*; for that they *per conspirationem et confederationem inter eos malitiose fact' apud Greham, &c. anno regni domini regis nunc 29, procuraverunt et fecerunt prefatum Willum de Welbye citari coram Nicholao de Whitechurch archidiacono episc' Lincoln' ad respondendum prefat' Will' &c.* for a trespassse, whereof he had been acquitted in the kings court. Hemswell pleaded not guilty. Malden the other parson pleaded that he was *communis advocatus, et pro suo dando, &c.* and justified as an attorney, and denied that he conspired, &c. Whereupon issues being joyned, it was found before Gilbert de Rowberie, that Malden the parson of Askerbye was *communis advocatus*, and was not guilty of the conspiracy, &c. and the other was found guilty, and judgement was given against him; for in this and the like a conspiracy will lye against one: otherwise it is in case of felony. By this record it appeareth, that a writ of conspiracy doth lye upon the said act of 21 E. 1. (for the conspiracy was alledged before our statute) for a conspiracy between two for the one of them to sue the plaintife in the spirituall court: and note the record saith, *contra ordinationem domini regis*. And note, it did lye for conspiracy in a suit in the ecclesiastical court.

C A P. XI.

DE rechiese pur ceo que le roy avoit avant ordeine per lestatute, que nul de ses ministers ne prist nul plee a champertie; et per cel estatute auters ministers n'estaient pas avant ces heures a ceo lies: voit le roy, que nul minister, ne nul auter, pur part avoier des choses que sont en plee' (1), enpreigne les besoignes que sont en plee. Ne nul sur

AND further, because the king hath heretofore ordained by statute, that none of his ministers shall take no plea for maintenance, by which statute other officers were not bounden before this time; the king will, that no officer nor any other (for to have part of the thing in plea) shall not take upon him the business that

sur tiel covenant (4) son droit ne lessé a auter. Et si ul le face, et de ceo soit attainé, soit forfait, et encurr' devers le roy des biens, et des terres le parrour, a la value de tant (2) come sa part de son purchase per tiel emprise amouter'. Et a ceo attend', soit rescue celui que suer voudr' pur le roy devant les justices, devant queux (3) le pleé avera este, et per eux soit lagard' fait. Mes en ceo case n'est mye a entendre, que home ne poit aver counsaile des countours, et des sages gents (5) pur son donant, ne de ses procheine amies (6).

that is in suit; nor none upon any such covenant shall give up his right to another; and if any do, and he be attained thereof, the taker shall forfeit unto the king so much of his lands and goods as doth amount to the value of the part that he hath purchased for such maintenance. And for this atteindre, whosoever will, shall be received to sue for the king before the justices, before whom the plea hangeth, and the judgement shall be given by them. But it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of learned men in the law for his fee, or of his parents and next friends.

(3 Ed. 1. c. 25. 13 Ed. 1. stat. 1. c. 49. 13 H. 4. f. 17. Fitz. Champerty, 3, 4. 6 12. 14, 15. 2 Inst. 118. 1 Ed. 3. stat. 2. c. 14. 1 R. 2. c. 4. 32 H. 8. c. 9. 21 Ed. 3. f. 52. Bro. Champerty, 11. Raft. 119. 427, &c.

The cause of the making of this statute was, that where the statutes of W. 1. 11 E. 1. and W. 2. of champerty were particular, and extended only to the kings ministers, the chancellor, the treasurer, justices, the kings counsellors, clerkes of the chancery, of the exchequer, and of justices, and to those of the kings household, clerke or lay. Now this act is generall, and doth extend to all persons; for the words are generall, *nul minister, ne nul auter*.

(1) *Pur part aver des choses que sont in plea.*] If A. bargain with B. owner of the manor of D. B. is impleaded, B. enfeoffed A. hanging the suit according to the bargain, though this be within the letter of the law, yet is it not within the meaning. On the other side, it is adjudged champerty, if he maintaine any party hanging the plea to have part, though he purchase not, nor take any state. And this act extendeth to all actions, as well personall, reall, and mixt. If the tenant hanging the plea grant a rent out of the land, this is champerty, and yet it is no part of the thing in demand, but it is within the same mischief. In an assise brought against the disseisor, and the tenant maintaine the plea upon covenant or promise after recovery to have part; although the disseisor hath nothing in the land, yet shall he have an action of champerty, because he may be charged with damages, and the tenant shall have his action also.

If the husband and wife be impleaded, and one doth maintaine for champertie, the husband onely may have the action, or the husband and wife may joyne.

And this action may be brought hanging the principall plea before judgement; and if the demandant be non-suit, yet may he have an action of champerty.

If two be impleaded in a reall action, and one doth maintaine the demandant to have part, the tenants bring a writ of champerty, the non-suit of one is not the non-suit of the other, because the

W. 1. cap. 25.
W. 2. cap. 29.
Stat. de Champertie, an. 11 E. 1. Vet. Mag. Chart. 10. 80. b.

19 R. 2. champert. 15. Pl. com. 465. 30. aff. p. 15. 8 E. 4. 13.

47 E. 3. 9.
F.N.B. 172. k.

47 E. 3. 9.
F.N.B. 172.

47 E. 3. 9.

47 E. 3. 9.
33 E. 3. maintenance. 26.

47 E. 3. 6.
Lib. 5. fol. 25.

aſſion of champerty being but acceſſary, doth follow the nature of the principall aſſion.

If the tenant make a feoffment in fee hanging the writ, if one doth maintaine the demandant to have part, the feoffor ſhall have the aſſion of champerty; for he remaines tenant to the demandant.

8 E. 4. 13.

(2) *A la value de tant, &c.*] That is to ſay, the value of the land.

See the ſtatute of 32 H. 8. cap. 9.

(3) *Devant les juſtices devant queux.*] See the ſtatute of 4 E. 3. cap. 11.

Regiſt. 183.
22 H. 6. 7.

Note, the party grieved may upon this ſtatute either have a writ directed to the ſherife, or a writ directed to the juſtices before whom the principall aſſion dependeth.

F.N.B. 172. I.

(4) *Ne nul ſur tiel covenant.*] Here it is taken for a promiſe or contract by parol, as well as by deed.

1 E. 3. c. 14.
1 R. 2. c. 4.
32 H. 8. 9.

See the ſtatutes of 1 E. 3. 1 R. 2. and 32 H. 8.

(5) *Mes en ceo caſe neſt my a entendre, que home ne poet aver counsell de ſes countours, ne des ſages gents.*] Counsell, *conſilium*, is taken for advice and direction in law, and that is to be had of three perſons, viz. 1. of ſerjeants at law, *ſervientes ad legem*, expreſſed here under the name of *countors*: 2. of apprentices of law, *apprenticii legis*, in pleading called *homines conſiliarii, et in lege periti*, expreſſed here under this word *sages*. And theſe have *officium ingenii*: 3. Attornies of law, that have *officium laboris*, in following the advice of the learned, and diſpatching of matters of courſe and experience, and they are under theſe words, *sages gents*. *Conſilium* is alſo taken for aſſiſtance, maintenance, and comfort in their ſuits. And ſo it is taken here.

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(6) *De ſes prochein amyes.*] That is, of their next of blood, who are or ought to be their ſureſt aſſiſtants, aiders, and comforters; for *naturæ vis maxima*, and as ſome ſay, *natura bis maxima*.

And according to this diverſity of ſignification, if the ſerjeant at law, apprentice, or attorney doe take a feoffment hanging the plea, or the like to maintaine the tenant, though it be *pro ſuo dando*, in lieu of his fee, yet is this champerty within the purview of this ſtatute; for their counsell, that is, their advice and direction in their profeſſion of law is excepted: but to take any eſtate in the land, hanging the writ, for maintenance, is to become a party, and in no ſort allowed to them by this aſt.

6 E. 3. fo. 33.
20 H. 6. 12.
Pl com. 305.
F.N.B. 172. h.
Li. 7. fo. 13, 14.
Calvins caſe.
21 H. 6. 16. b.
29 H. 6. mainte-
nance 12.
19 E. 4. 3. b.
34 H. 6. 26.
39 H. 6. 5.
6 E. 4. 5.
9 E. 4. 32.
14 H. 7. 2, &c.

But if a father be impleaded, he may infeoffe his ſon for his aſſiſtance, maintenance, and comfort; for that is naturæ profeſſion for the ſon *aſſiſtere, manutenere, et conſolari, et e converſo, et ſic de ſimilibus: et ſic alia eſt profeſſio legis, et alia naturæ*.

So it is, that the ſon may of his owne mony, and in his owne name give fees to his fathers counsell, or attorney, without any expectation of repayment, and ſo may the father to his ſons counsell; for he is *prochein amye*, but ſo cannot the ſerjeant nor apprentice, for that their counsell, advice, and direction in law is only ſaved to them. But the attorney may in his maſters name lay out his owne mony to his counsell, to be repaid to him by his maſter againe.

In like manner, and by the like reaſon, if the father be demandant in a *præcipe*, he may promiſe and contract with the ſon to aſſure him

him the land after the recovery, and is not any champerty within this act, and so of any other ancestor and his heire apparant: but so it is not of the serjeant, apprentice, or attorney; for they cannot contract to have any part of the thing in demand after the recovery, *et sic de similibus*. And therefore Penros case maketh not against this, nor any thing that hath been said: for there the case (as Hanckford imperfectly citeth it) was, that in a writ of champerty brought against Penros, for that he had parcell of the land recovered against him at another mans suit, Penros said that he was of counsell with the party which recovered, and had that land for his wages: but let us take the ford as we find it (though Fitzherb. in abridging this case, not knowing what to make of it, omitted it) the taking of the state for his wages after the recovery could be no champerty, unlesse there had been a covenant or promise hanging the plea on the demandants part, to make the same after the recovery, which was not alledged but only the taking of the state: neither doth it appeare what became of Penros plea: and we are of opinion, that it shall remaine for ever a blemish to his reputation, as often as it is cited; for, *quamvis aliquid ex se non fit malum, tamen si fit mali exempli, non est faciendum*.

(6) *De ses prochein amyes, &c.*] Of *prochein amyes* you have heard before, this is to be added, that there be not onely *prochein amyes* in blood, but in estate also: and therefore as the next of blood is *prochein amy*, in respect of the expectancie of a discent (and yet it may be it shall never descend to him: for *solus deus facit hæredes, non homo*) so they that have reversion, or remainders expectant upon estates in taile, life or lives, are *prochein amyes* in estate, and are excepted out of this law, and yet it may be the land shall never come in possession to them: and therefore if a *præcipe* be brought against a tenant for life, and he surrender to him in the reversion or remainder, hanging the writ, for maintenance, this is no champerty within this act, no more then it is when the tenant infeoffeth his heire apparant: and so it is if tenant in taile, hanging the writ, conveyeth the land to him in reversion or remainder, this is no champerty for the cause afore said within this act.

For the word *prochein amy*, *proximus amicus*, or *amicus propinquus*, see Littl. W. 1. and W. 2. &c.

17 E. 3. champerty 14. per les Justices. 19 E. 4. 3. b. F.N.B.

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Littl. sect. 123.
W. 1. ca. 48.
W. 2. ca. 15.

C A P. XII.

DE rechiese voet le roy que distresses, que sont a faire pur sa dett, ne soyent faits per bestes des charues, tanque come home poet auter trouver, selonque ceo que est ordeine ailours per estatute (1), ove la paine, &c. Et ne voet que trope greve distresse soit prise pur sa dett, ne trope loigne mesne (2). Et si le dettour poet trouver suffisant, et couvenable suretie (3), jescq; a un jour deins

FROM henceforth the king will, that such distresses as are to be taken for his debts shall not be made upon beasts of the plough, so long as a man may find any other, upon the same pain that is elsewhere ordained by statute, &c. And he will not that overgreat distresses shall be taken for his debts, nor driven too far; and if the debtor can find able and convenient surety

deins le jour al viscount, dedeins le quel home puisse purchaser remedie a faire gree de la demaund, soit la distres relese endementiers, et que auterment le fra soit grevement punie.

surety until a day before the day limited to the sheriff, within which a man may purchase remedy to agree for the demand, the distres shall be released in the mean time; and he that otherwise doth, shall be grievously punished.

(4 H. 7. f. 8. 51 H. 3. stat. 4. 52 H. 3. c. 4. Regist. 97. 185. Raft. pla. 226.)

51 H. 3. Vet. N.
B. fo. 89. b.
Regist. 97. b.
Raft. pl. 118.
393. 450.

(1) *Per statute.*] This is intended of the statute intituled, *statutum de distriktionibus seccarii, editi an. 51 H. 3.* which by mistaking is in the abridgement of statutes, tit. Distresses 10. supposed to be in anno 21 E. 1. which should be made 51 Hen. 3. the words of that act (amongst other things) are, *Que nul home de religion, ne auter soit distrein per les bestes, queux gaingnont sa terre, ne per les barbitres pur la det le roy, ne pur le dett dauter home, ne pur auter encheson per les baillies le roy, ne per auters homes tanque come un trove auter distres, ou auters chateux suffisantes, dont ils poient lever le det, ou que suffist la demande, &c.* But hereof sufficient hath been said in the exposition of the statute of Marlebridge.

F.N.B. 174.
Regist. 97. 185.
Marlebridge, c. 15.

(2) *Et ne voet que trope greve distres soit prise, ne trope loigne mesne.*] This is also provided for by the said act of 51 H. 3. and sufficient also hath hereof been said in the exposition of the said statute of Marlebridge, cap. 15. and these acts were made to take away the abuse of the sherifes, bailifes, and other ministers.

F.N.B. 174.
Regist. 97.

Act of grace.
Vid. Mag. Chart.
cap. 8, &c.
Reg. 185, 186.
F.N.B. 174. b.
36 E. 3. ca. 9.

(3) *Et si le dettor poet trover suffisant et covenable suertie, &c.*] This is an act of grace, and upon this act there lyeth a writ directed to the sherife, commanding him to receive surety according to this act, which if he refuse, an attachment lyeth against him, or the party offering surety according to this act, if it be refused, may have an action against the sherife, &c.

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C A P. XIII.

E*T pur ceo que le roy ad grant (1) le election des viscounts a ceux des counties, voit le roy que ils essient tiels viscounts, que ne les charge ny: et ne mittent nul minister en baille pur lower, ne pur don'. Et que tiels ne se herbergent trope souvent en un lieu, ne sur les povers, ne sur les religious.*

AND forasmuch as the king hath granted the election of sheriffs to the commons of the shire; the king will, that they shall chuse such sheriffs that shall not charge them, and that they shall not put any officer in authority for rewards or bribes; and such as shall not lodge too oft in one place, nor with poor persons, or men of religion.

(1) *Ad grant.*] This grant was made before at this parliament, cap. 8.

By this act five things are to be observed by the sherife: first, that he be not chargeable to the county: 2. that he shall put no minister

minister in office under him for hire, gift, or bribe: 3. that they shall not too often lodge or harbour in one place: 4. that they shall not lodge or harbour at all with those that are poore: 5. nor with religious men.

And albeit the manner of making of sherifes be altered, as before in the exposition of the eighth chapter doth appeare, yet the said articles are to be observed by him: for they follow the office of the sherife without respect of the maner of his making: and therefore if any sherife take any hire, gift, or bribe of any undersherife, baylife, keeper of the gaole, or other minister for his office or place, he may be indited, and fined, and imprisoned.

See other statutes against sale of offices, &c. 12 R 2. 11 H. 4. 5. E. 6. And in like manner touching the rest of the articles prohibited by this chapter, see the next chapter.

12 R. 2. cap. 2.
11 H. 4. Rot.
parl. nu. 23.
5 E. 6. ca. 16.

C A P. XIV.

DE rechiese voit le roy, que les bailifes et les hund' du roy, ne les autres grand seigniors de la terre ne soient lesses a trepe grand summe a ferme, per quoy le peuple soit greve, ne charge per contribution faire a tiels fermes.

FROM henceforth the king will, that the bailiwicks and hundreds of the king, nor of other great lords of the land, be not let to ferme at over great sums, whereby the people are over-charged by making contribution to such fermes.

This act was made for avoiding of extortion and oppression; for they that buy deare, must sell deare. For addition to this law it was enacted, that sherifes should not let their hundreds and wapentakes but for the old rent, and not above.

4 E. 3. ca. 15.

After by another act neither sherife, nor bailifes, or hundredors in fee should let any hundreds, &c. but for the ancient ferme, without any thing increasing.

14 E. 3. ca. 9.

And by another statute it was provided, that he should not let his bailiwick at all to any man, and that it should be parcell of his oath. Upon which act some doubt was conceived, whether if he let not his whole bailiwick, it was within that law; and besides, there was no penalty inflicted by that act; therefore by another law it is enacted, that no sherife shall let to ferme in any manner his county, nor any of his bailiwicks, hundreds, or wapentakes, upon paine of forfeiture of xl. li.

4 H. 4. ca. 5.

23 H. 6. ca. 10.
20 H. 7. 12. &
21 H. 7. 36. Pl.
com. 87. & 124.
Vid. Mag. Chart.
cap. 8, &c.

And this act, as to the king, is a bill of grace.

C A P. XV.

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EN summons (1) et attachments (2) en plea de terre (3), de fermes con- teigne la summons ou l'attachement le terme de xv. jours a tout la meyns (4),
selonque

IN summons and attachments in plea of land, the summons and attachments from henceforth shall contain the term of fifteen days full at the

3 N 3

least

selonque la common ley, sil ne soit en attachment des assises prendre en presence le roy (5), ou devant les justices del common bank, ou des ples devant justices en eire, durant le eire.

least according to the common law, if it be not in attachment of assises taken in the king's presence, or of pleas before justices in eyre during the eyre.

See Marlbridge, cap. 12. & 26. (Fitz. Jour. 16, 17. 36. Bro. Attach. 3, 4. 6, 7, 8, 9, 10. 13. 15, 16, 17.)

F.N.B. 177. d. c.
11 aff. p. 30.
22 aff. p. 79.
30 aff. 26. & 44.

* 12 E. 4. 11.
Glan. li. 1. ca. 7.
Bract. li. 4. fo.
255. & 182.
Brit. fol. 279. b.
Flet. li. 6. ca. 6.

The printed bookes leave out (*ou devant les justices del common bank*) which ought to be added.

This statute was made in affirmance of the common law, as by the expresse words of the statute it appeareth, contrary to a sudden and misconceived opinion in our * bookes: for Glanville saith, *Summonbitur per intervallum quindecim dierum ad minus*: and therewith agreeth Bracton and Britton, *Et si ascun soit resonablement summon, il doit aver space de xv. jours au meynes, de soy garner de son respons.* And Fleta saith, *Nec etiam sufficit quod summonitio fiat ad statim respondendum, sed decet quod quilibet habet tempus xv. dierum ante diem litis, et si summonitio minus spacium, pro illegitima debet reputari, nisi in causis specialibus; ut sunt cause mercatorum, et crucefiguratorum, et hujusmodi que instantiam desiderant et celeritatem, &c.* And all these authors wrote before the making of our act: and the author of the Mirror that wrote of the ancient lawes of this realme, speaking of the time of summons, saith, *Et reasonable respit al meyns de xv. jours de purveire respons, et de parer en judgement.* And the cause wherefore the common law set downe the certaine time of 15 dayes was, for that a dayes journey is accounted in law 20 miles, *rationabilis dieta constat ex viginti miliaribus*: for dieta both in the common and civil law signifieth a dayes journey, *continet legalis dieta viginti miliaria*. And therefore 15 dayes was accounted by the common law a reasonable time of summons or attachment, within which time wheresoever the court of justice sate in England, the party summoned or attached, wheresoever he dwelt in England, afore the kings writ did come, might *per predictas dietas computatas*, by the said account of dayes journeys appeare in court, &c.

Mirr. c. 2. § 19.

Bract. lib. 4. fo.
235. b. 19 H. 7.
ca. 1. the like
account is made.
Lib. intr. tit.
Journeys ac-
counts, f. 382.
li. 6. f. 10. & 11.
Spencers case.
18 E. 3. 42.
32 E. 3.
Journeys acc^d 16.
Customere, c. 61.
fol. 76, 77.
12 E. 4. 11.

(1) *Ex summons.*] In a writ of pone, to remove a replevin at the suit of the defendant, the writ saith, *et dic prefato querenti, quod sit coram justiciariis nostris apud Westm' tali die*, there ought to be a warning by 15 dayes, for that this (*dic querenti*) is in nature of a summons, and so the writ of *venire fac'* for returning of a jury is in nature of a summons: but this statute extends not to a writ of errour, nor to dayes of prefixion, as upon a forreine voucher in London, and the like.

1 E. 5. 2. b.
Bract. lib. 4.
fol. 255.
1 E. 5. 2. b.
Dyer 8 El. 252.
9 E. 4. 18.

This act speaketh of a summons, and so it is in a resummons.

(2) *Et attachments.*] And so it is in a re-attachment.

(3) *En plea de terre.*] Upon an originall writ in any reall action the tenant must be summoned by 15 dayes, as is aforesaid; but if the originall writ be returned *tarde*, the *sumoneas sicut alias* must have nine returns between the *teste* and the returne: for albeit the *sumoneas sicut alias* be in lieu of the summons in the originall, yet being a judiciall proceffe in a reall action, there must be nine returns, &c. and the summons thereupon ought to be made by 15 dayes, or more, before the returne.

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24 E. 3. 35. 46.
22 E. 3. 7.
31 H. 6. 13.
27 H. 6. 2.

(4) *Le terme de 15 jours a tout le meynes.*] These 15 dayes or more must be before the day of the returne of the writ, and the day of the returne must be accounted none of them.

(5) *Si*

(5) *Si ne soit en assises prender en presence del roy, &c.] En presence del roy*, that is, in the kings bench, for there all pleas be *coram rege*. It was accorded in 7 E. 2. by Sir Guiliam Inge chiefe iustice of the kings bench, and the iustices, that in writs of attaints upon an assise of *novel disseisin* taken in the kings bench, there shall be a certaine day given as in the assise; for example, the Monday, or the morrow, or in the *usas* or *quinden'* of Easter: but it behoveth that the tenant hath garnishment by 15 dayes in the attaint, for this statute of *articuli super chartas* doth not give any lesse terme, but only in an assise of *novel disseisin* in the kings bench, common pleas, or in eire.

This branch, as to the kings bench, seemeth to be in affirmance of the common law; for in criminall causes, which concerne the life of man, if a man be indited of treason or felony in the county where the kings bench doth sit, the *venire fac'* for the returning of the jury need not have 15 dayes between the *teste* and the returne, nay the entry may be *ideo immediate venit inde jurata, &c.* But if the inditement be taken in any other county, and removed into the kings bench, there ought to be 15 dayes between the *teste* of the *venire fac'* and the returne.

* Commissioners of oire and terminer may in case of treason, felony, misprision, trespass, &c. trie the prisoner the same day they award the *venire fac'*, as by divers presidents ancient and late doe appeare; but the commissioners must make a precept in parchment under their seales for the returning of a jury immediately the same day, if they will, or any day after, and likewise iustices of gaole delivery, or iustices of peace may trie the prisoner the same day, or any day after, but need not make any particular precept: for the iustices of gaole delivery, and iustices of the peace make a generall precept in parchment under their seales for the sommons of the sessions, and for returne of juries, &c. and therefore any particular precept is not requisite.

There was a generall sommons made 40 dayes before the sitting of the iustices in eire.

* We have the rather spoken somewhat hereof, because there is a report of the resolution of the judges, that commissioners of oire and terminer, or iustices of peace cannot trie a prisoner that pleads not guilty the same day that he pleads, &c. But herein at this day not onely *jurisperiti*, but *usuperiti* also doe agree.

London, treason. Hill. 36. El. Doct. Lopes in London, &c. treason.

Pasch' 9 H. 8. Kelwey. Holl. Chronic. 8 H. 8. fol. 843. 22 E. 4. tit. coron. 44.

Regist. 204. a.
7 E. 2. per les
iustices.
F.N.B. 109. a.

Li. 9. f. 118. b.
Seignior Zan-
chars case.

* Hill. 2. H. 4.
rot. 4. Thomas
Marks eveiq' de
Carlile, treason.
Lunæ post
festum Mich.
an. 1. H. 8.
Sir Richard
Empson, treason.
10 Decem. 3 E. 6.
Thomas Bon-
ham, before
Portman chiefe
iustice, and
other iustices,
treason.
2 Decem. 3 E. 6.
before Lyster,
Mountague
Cholmeley, &c.
Robert Bell,
treason.
4 August. 10 El.
John Felton, &c.
5. tit. enquest 55.

C A P. XVI.

*SOIT fait de ceux que font faux re-
tornes des briefes al maundement le
roy, per quoy droiture est delay, auxy
come ordeine est en le second estatute de
Westminster ove la peine.*

THAT shall be done with them that make false returns (whereby right is deferred) as it is ordained in the second statute of Westminster, with like pain.

(13 Ed. 1. stat. 1. c. 39.)

This isan act of confirmation, whereby the statute of W. 2. cap. 39. touching false returnes, is confirmed.

C A P. XVII.

ET pur ceo que mults misfeasors sont en la terre pluis que ne solent, et robberies, arsons, e homicides faits sans number, et la peace meynes bien garde, pur ceo que lestatute, que le roy fist faire nadgaires passés a Winchester, nad pas este tenus: voit le roy que cel estatute soit de novel envoy en chescun countie, et soit lie et publie 4 foits per an (1), auxy bien come les deux graund charters (2), et fermement gardes en chescun point, sur les paines que la cyens sont asséses. Et a cel estatute garder et maintenir, soient charges les trois chivaliers (3), que sont assignes per mye les counties pur redresser les choses faits encunter les grand charters, et de ceo eyent garrantie.

AND forasmuch as there be more malefactors in the realm, than had wont to be, and that robberies, burnings, and man-slaughters are committed out of measure, and the peace little observed, by reason that the statute which the king not long past caused to be made at Winchester is not observed; the king will, that the same statute be sent again into every county, to be read and published four times in the year, and kept in every point as straidly as the two great charters, upon the pains therein limited. And for the observing and maintenance of this statute, the three knights that be assigned in the shires for to redress things done against the said great charters, shall be charged, and shall have their warrant therefore.

(13 Ed. 1. stat. 2. c. 1.)

Vid. Flet. lib. 1. cap. 24. this statute of Winchester recited.

Vid. li. 7. f. 6, 7. cafes sur cest, statute.
3 E. 3. coron. 293.

28 E. 3. ca. 11.
27 Eliz. ca. 13.

Dyer 23. El. 370.
Brit. f. 20. 32. b. & 263. 160.
Elegit.

The effect of the statute of Winchester made at a parliament holden in 13 E. 1. is this, that from thenceforth every country should be so well kept, that immediately upon such robberies and felonies committed, fresh suit should be made, &c.

The letter of this statute is general; and first, concerning the place: if a man be robbed in his house it is not within the meaning of this statute. Secondly, the time: if a man travell in the night, and be robbed, he shall not take the benefit of this act, as you may reade at large, lib. 7. *ubi supra*.

See the statutes of 28 E. 3. and 27 Eliz. which have in some points altered, in some explained, and added divers articles to this statute of Winchester.

Britton maketh mention of the statute of Winchester in these words, *solonque nostre ordinance de nous statutes de Winchester*, and of the statute of W. 2. an. 13 E. 1. So as he wrote not his book in 5 E. 1. as Prifot supposed: neither died he in 3 E. 1. *anno Dom.* 1272. as Bale, fol. 111. hath mistaken; but certainly he wrote his booke after 13 E. 1.

And it appeareth by Fleta, *ubi supra*, that the time given to the country by the statute of Winchester is not within 40 dayes, as the booke of statutes lately printed mistakes it, but *infra dimid' anni*, and so is the printed booke of statutes by Berthelet; and therefore it would be reformed accordingly. True it is, that the statute of

28 E.

28 E. 3. doth expressly set downe 40 dayes; but yet the words of the statute of Winchester must remaine as they were. 28 E. 3. ca. 11.

For actions brought upon the statute of Winchester, see Hil. 4 H. 8. rot. 525. Pasch. 4 H. 8. rot. 310. Mich. 6 H. 8. rot. 1. Pasch. 12 & 13 Hen. 8. rot. 4 Eliz. rot. 508. &c. which were before the statute of 27 Eliz. Lib. intr' Rast. 580. Lib. 7. fo. 6. ubi supra.

See Trin. 28 Eliz. rot. 75. Ashpoles case, and Trin. 29 El. rot. 1027. Milborns case. Lib. intr' Co. fol. 348.

Which precedents I have added, because they serve both for exposition of the said statutes, and for direction to the party grieved to attaine to the benefit of the same. Lib. 7. fol. 6. ubi supra.

If any desire to see some precedent neerer the making of the statute of Winchester, let them see the record of that notable case of Ellice Caller in 2 E. 3. and they shall perceive, that actions grounded upon this statute were not subject to such captious and curious exceptions, as now they be. There the case was, that Ellice Caller was robbed in the hundred of H. in the confines of two counties, &c. and brought his action upon this statute, and had judgement, and sued execution to the sherife of Stafford, who returned, that he had levied x. marks of the men of the bishop of Coventry and Litchfield of the hundred of H. the bishop came and said, that the hundred of H. was of the right of his church of Saint Cadde of Litchfield, and shewed forth to the court the charter of king Richard the first, by the which he granted to E. then bishop of Coventry and Lichfield, and to his men, that they should be quit of murder and larceny, that is, to be quit and discharged of every thing that lyeth in charge of his men, by reason of murder or felony; as of amerciaments and of presentments of murder and felony. But the authority of the booke is, that the bishops men ought not to be discharged, and Shard that giveth the rule, giveth also two reasons thereof.

Hill. 2 E. 3. fo. 6. & 7.

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First, that the charter of Rich. 1. could not discharge this action, for that at the time of that charter an action against the inhabitants, by reason of robbery, &c. was not granted, but it was granted long after, that is to say, in anno 13 E. 1. and we doe not entend, that by reason of the charter, being more ancient then the statute of Winchester, you may barre or discharge the execution.

Secondly, albeit the king by his charter may grant, that a man may be acquitted against him and his successors, yet thereby the action or right of the party cannot be taken away.

The burgeises of the towne of Tewksbury in the county of Gloucester brought an action of debt upon the statute of 8 H. 6. which hath reference to this statute of Winchester, if satisfaction be not made for the robbery therein mentioned within 15 dayes after proclamation, and the action is given against the comminalties of the forest of Deane, which are adjacent to the river of Severn, and of the hundreds of Bledislow and Westbury, and the writ was, *Præcipe communitati forestæ de Deane, et hundredis de B. & W.* and exception was taken to the writ, for that the writ ought to have been, *Præcipe communitati forestæ de Deane, et hundredorum de B. et W.* according to the words of the statute of 8 H. 6. as one entire comminality; and yet the writ was awarded good, for that it was the same in effect, though it had been the better, if it had accorded with the words of the statute.

11 H. 6. fo. 47. a. 8 H. 6. ca. 27.

It is said, that one that took upon him the profession of the law, made a motion, that all the superfluous cases of the law reported in our bookes might be rejected, and left out of the next impression,

and principally those that Fitzherbert had not vouchsafed to abridge. But indeed the motion was superfluous and smooke, and therefore vanished; for there is no case reported in our bookes, but is worthy of observation; for thereof great use may be made at one time or other, if it be well understood and remembred, and we should have been right sorry, if these two excellent cases, amongst many others, had been rejected.

(1) *Et soit lye et publie 4 foits per ann'.*] This is evident.

(2) *Auxybien come les deux grand charters.*] Here it is to be observed, that *Magna Charta*, and *Charta de foresta* are called, *les deux grand charters*.

By the first chapter of the acts of this parliament it is provided, that these two charters shal be read foure times every yeare before the people in full countie, that is to say, in the next county after the feast of Saint Michael, and after the feast of the nativity of our Saviour, after Easter, and after the nativity of Saint John Baptist, and so oft, and at those times, ought the statute of Winchester to be read and published.

(3) *Soit charge les trois chevaliers.*] These three knights are authorized before cap. 1.

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C A P. XVIII.

EN droit des wastes et destruccions faits en gard's per escheators et subescheators (1) de measons, bois, parkes, viuers (2); et de tous auters choses, que eschient en les maynes le roy (3): voit le roy, que celui que aver' le dam' rescere, eit brieve de waste (4) en la chancery vers lescheator de son fait, ou subescheator de son fait, sil eyt de quoy responder, et sil nad de quoy, ci respond' son souveraigne (5) per autiel peine, quant as damages, come' darreine ordeine est per estatute (6) sur ceux que font waste en gardes.

FOR redress of wastes, and destruccions done by escheators or subescheators in the lands of wards, as of houses, woods, parks, warrens, and of all other things that fall into the king's hands; the king will, that he which hath sustained damage, shall have a writ of waste out of the chancery against the escheator for his act, or the subescheator for his act (if he have whereof to answer) and if he have not, his master shall answer by like pain concerning the damages, as is ordained by the statute for them that do waste in wardships.

(6 Ed. 1. stat. 1. c. 5. 14 Ed. 3. stat. 1. c. 13. 36 Ed. 3. c. 13. Regist. 72. Raft. 693. 12 Car. 2. c. 24.)

36 E. 3. ca. 13.
cap. Escheatrice.
94p. 5.

Where some have thought that the escheator and underescheator are not within the statute of *Magna Charta*; and therefore in this point the title of *confirmatio chartarum* is not apt as to this chapter, let them reade the statute of 36 E. 3. and they will be satisfied.

* Regist. 301.
cap. Escheatrice.
Mirr. ca. 1. § 5.
Statut. de Scacc.
5: H. 3.

(1) *Per escheators et subescheators.*] Of their names, and whence they are derived, of their antiquity and office, of their number in ancient time, and what alteration hath been by acts of parliament

liament of later times, you may reade in the first part of the Institutes.

(2) *Parkes, viuers.*] Here *vivers*, *vivaria*, are taken for fishponds and warrens, as heretofore we have observed.

(3) *Et de tous autres choses, que escheient en le maynes le roy.*] ^a That is, of all other things which casually fall, or escheat, or come into the kings hands.

(4) *Eyt briefe de waste.*] ^b For the action of waste against the escheator, see the Register, F.N.B. &c.

(5) *Respond' son souveraigne.*] *Respondeat superior*, that is, the escheator shall answer for the deputy escheator, or under-escheator.

(6) *Per estatute.*] That is, by the statute of Glocester, anno 6 E. 1. cap. 5. and W. 2. anno 13 E. 1. cap. 21.

And it is to be observed (that we may note it once for all that in this and other ancient acts of parliament that have relation or reference to any former, there is not any mention made of the yeare or chapter of the former statute, but the generall reference was then thought the surest, and the more parliamentary way.

Brit. fol. 53, 34.
Flet. lib. 1. ca. 6.
Rot. Parl.
13 E. 1. fol. 7. 3.
21 E. 1. rot. 1.
28 E. 1. cap. 13.
29 E. 1. de
escheat. 14 E. 3.
cap. 8. 1 H. 8.
c. 8. F.N.B. 100.
Stamf. pr. 81.
1. part of the In-
stitutes, sect. 4.
^a See the first
part of the Insti-
tutes, ubi supra.
^b Regist. 72.
F.N.B. 59. b.
Vet. N. B. fo. 36.
Stamf. prer. 81.
14 E. 3. ca. 13.
36 E. 3. ca. 13.

C A P. XIX.

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DE rechiese la ou lescheator, ou le viscount seisiert en la mayne le roy (1) autres terres, la ou il nad raison de seisier: et puis quant trouve est la non raison, les issues du mesme temps ont estre ceo en arere retenus, et nemy rendus, quant le roy ad la mayne ouste: voit le roy que desformes, la ou terres sont issint seisiies, et puis la mayne ouste pur ceo que il nad raison de seisier, ne ceo tener, soient les issues pleinement rendus a celui a que la terre demurt, et avera le damage rescieve.

FROM henceforth, where the escheator or the sheriff shall seise other mens lands into the king's hands (where there is no cause of seiser) and after, when it is found no cause, the profits taken in the mean time have been still retained, and not restored, when the king hath removed his hand; the king will, that if hereafter any lands be so seised, and after it be removed out of his hands by reason that he hath no cause to seise nor to hold it, the issues shall be fully restored to him to whom the land ought to remain, and which hath sustained the damage.

Vide W. 1. cap. 24. (Regist. 314. Rast. 604.)

See the statute of 29 E. 1. *de escheatoribus*, commonly called the statute of Lincoln, made the yeare after this law; and upon these two statutes ten points are to be observed;

1. That by the common law, although the seisure was not lawfull, yet for the mesne profits upon the livery, or *ouster le mayne*, the party grieved was not restored to the mesne profits, which mischiefe is remedied by these two statutes.

2. Issues are intended rents and things leviable by the escheator, which may be restored, though the escheator hath accounted for them,

24 E. 3. 28, 29.
59. 5 E. 3. 6.

them, and not paid; but the mony, being once in the kings coffers, shall not be restored.

3. That though both these statutes speake onely of an *ouster le mayne*, yet being both beneficiall lawes for restitution to be made to the party grieved, by equity they extend to liveries.

4. Where the words seem to extend onely to seifures before office, and after by the office that is found the king is not intituled, yet by contruction the same extend onely to seifures after office found. See hereafter *verbo Seifent*.

5. These statutes extend by equity to *ouster le mayne*, and *amoveas manus* upon petitions, and *monstrans de droits*, not only in cases concerning wardship, but freehold and inheritance.

6. These statutes extend also by like equity to *ouster le maynes* upon traverses, although traverses were not in use at the time of the making of these statutes.

7. By the said statute of 29 E. 1. if any former office or record be found after livery, or *ouster le mayne*, that maintaineth the title, by reason whereof the king is seised, the king upon that record shall not reseise *maintenant*, but thereupon sue out a *scire facias*, &c.

8. But if an office be found, which doth entitle the king to the land by a title growne to him since the livery, or *ouster le mayne*, neither of these statutes restraine the king, but that he may reseise without a *scire facias*.

9. * There is a diversity, when the party hath a livery or *ouster le mayne* upon an insufficient office, or by erroneous proceffe, there though the party hath right, yet the king shall reseise without *scire fac*: for a livery mis-sued is as it had been never sued, and the statute of 29 E. 1. is to be understood of a livery or *ouster le mayne*, duely and lawfully sued for that which is insufficient is nothing in law: but when the party sueth out his livery or *ouster le mayne* duely and according to law, where in truth he hath no right, but the king, if he had been apprised of his title appearing of record, no livery or *ouster le mayne* ought to have been granted, yet there upon that record the king cannot reseise without a *scire facias*.

10. Some have holden, that at the common law he that was in possession of the land, &c. by judgement, as in case of an *ouster le mayne*, livery, or *amoveas manum*, that no reseisure could be made for the king without a *scire facias*, and therein to avoid the former record by matter of as high nature: for the generall rules of law be, *Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine, quo ligatum est: et judicia sunt tanquam juris dicta, et pro veritate accipiuntur*.

(1) *Seifient en la mayne le roy*.] This seifure is intended after office: for before office lands or tenements cannot be seised into the kings hands, and so is the common experience at this day.

See the statute of W. 1. cap. 24.

That we passe over nothing that the statute of 29 E. 1. giveth us occasion to remember which is worthy of observation: it is there said, that the statute was commanded to be observed *de concilio venerabilis patris Walteri de Langton, Corvent' et Lichfield episc', tunc ejusdem regis thesaurarii, et Johannis de Langton cancellarii*, who then had the dealing with wards, &c. we will speak somewhat of both these great officers.

24 E. 3. 33.
9 E. 4. 52. Kel-
way, 1 H. 8.
156.

28 H. 6. fo. 9. b.
5 H. 5. 2. 30 aff.
28. F.N.B. 260.
4 H. 7. 5. Dyer,
8 El. 248, 249.
21 E. 3. 1. 21 aff.
15. 12 R. 2. li-
very 28. 40 aff.
* 21 E. 3. 1.
21 aff. 15. 40 aff.
36. 9 E. 4.
51, 52.
* 18 E. 3. liver.
3. 24 E. 3. 65.
Darcies case.
44 E. 3. 12.
Stamf. pr. fol.
11. & 80, 81.
Brok. reseif. 13.
24 E. 3. 33.

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5 E. 6. tit. Of-
fice. Br. 55. Lib.
8 fol. 169. Paris
Stoughton case.

This Walter de Langton, a gentleman of an ancient and faire descended family, was made lord treasurer of England in the 23 yeare of king Edward the first; he was a grave and a wise man, and was much favoured by the king, and in great authority under him, the rather, for that he with great discretion and moderation did wisely dissuade prince Edward (who after was king by the name of Edward the second) from such dishonourable and dissolute courses as he took, and was the principall motive that Pierce Gaveston, the wicked corrupter of the princes youth, was banished the realme. The prince in requitall hereof, on a time amongst other injuries, gave the treasurer foule and disgracefull words, whereof the noble king understanding, deemed the offence done unto himselfe; for so I find it of record in the same kings time, which record speaketh in these termes: *Et hoc expresse nuper apparuit, cum idem rex filium suum primogenitum, et charissimum principem Walliæ, pro eo quod quedam verba grossa et acerba cuidam ministro suo dixerat, ab hospitio suo fere per dimid' an' amovit, nec ipsum filium suum in conspectu suo venire permisit, quousque dicto ministro de præd' transgressione satisfecerat: quia, sicut honor et reverentia qui ministris domini regis ratione officii sunt, ipso regi attribuantur: sic dedecus et contemptus ministris ipsius domini regis fact' eidem domino regi inferuntur.* But we are sorry to remember, that the favour of a king, and the height of prosperity, which rightly used are the blessings of God, should make him presume to defile his hands with corrupt and sordid bribery, and to beguile himselfe to thinke that no man should dare to bring him in question. True it is, that he was judicially convicted in the first yeare of king Edward the second, but it was before foure of the principall judges of the realme and in effect upon his owne confession.

Coram rege
Mich. 33 E. 1.
Rot. 75.

All these briberies you may reade in a bundle of the records remaining in the treasury, intituled *Placita apud Winfor coram Roberto de Brabazon, Will' de Bereford, Rogero de Heigham, et Will' Inge justiciariis, &c. assignatis in cro' Sancti Andree apostoli, anno regni regis E. filii regis E. primo, rot. 3. 8. 14. &c. Servile est expilationis crimen, sola innocentia libera.* Histories may safely be believed, when there is a record to warrant them.

John Langton named also in the act of 29 E. 1. was then bishop of Chichester, and lord chancellour of England, he was of a great spirit, and feared not the face of great men in that dangerous time to doe that which he ought: for whereas Thomas the noble earle of Lancaster had lawfully married Alice onely daughter and heire of Henry Lacie earle of Lincoln, son and heire of William de Longa Spatha earle of Salisbury; and John earle Warren and of Surrey had to wife the kings niece, that is, Joan daughter of Henry earle of Barre, and of Elinor his wife daughter of king Edward the first, yet the faide earle Warren by great force and strong hand (*ut dicebatur assensu regio*) caused the said Alice countesse of Lancaster to be fetched from the earle of Lancasters house in Canford in Dorsetshire, and in great pomp and bravery (in despite of the earle of Lancaster) to be brought to him to his castle of Ryegate in Surrey, where they lived in open advoutry. This worthy bishop looking neither above him nor about him, but according to his office and duty called the said earle Warren in question for the said shamefull and open adultery, and by ecclesiasticall censures excommunicated him for the same, as he well deserved:

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Vid. Pasch'
8 E. 2. rot. 111.
Coram rege.

An. Dom. 1317.
& 10 E. 2.

deserved: in revenge whereof the earle, adding a new offence to the old, came with many of his followers weaponed for the purpose towards the bishop, to lay violent hands on him: but the bishop himselfe being a man of great courage, and being well attended with gentlemen and other his household servants, understanding thereof, they addressed themselves, and having put themselves in good order, issued out, and encountered with the earle and his men, and not onely manfully defended themselves against that barbarous attempt, but valiantly overcame the earle and his followers, and took them into their possession, and laid the earle and his gallants fast in prison by the bishops commandement.

Armaque in armatos sumere jura sinunt.

But, fearing that one of Virgils verses should be applied to us,

Virg. 5. Æneid.

Sed jam age, carpe viam, susceptum perforce munus,

We will returne to our statute.

C A P. XX.

ORDEIGNE est que nul orfeure d'Angleterre ne ailors de la seignorie le roy, ne ouere, ne face de ci en avant nul manner de vessel, ne joialx, ne auter chose dore ne dargent, que ne soit de bone et veray allay, cestassavoir, ore de certaine touche (1), et argent del allay del esterling (2), ou de melior allay, selonque le volent de celui, a que les ouerers sont. Et que nul ouer peyor argent que money (3). Et que nul maner de vessel dargent ne depart hors des maines des ouerours, tanquel el soit assay per les gardeins de la mister' (4) et auxy que el soit sign' dun teste dun leopard (5). Et que nul ne ouere peyor ore que de touche de Paris (6). Et que les gardeins du misterie allent de shope en shope enter les orfeours, assaiants que lore soit tiel come la touche avantdit. Et sils trouvent ul peyor que la touche, que leur soit forseit al roy. Et que nul ne face auneux, croix, ne firmaux (7). Et nul ne mett' pire en ore, si il ne soit naturel (8). Et que taillours des aimans et des seales, rendant a chescun son poyz dargent et dore auxy avant come ils le purront scaver sur leur foialtie. Et les joyaux dore, que

IT is ordained, that no goldsmith of England, nor none otherwhere within the king's dominion, shall from henceforth make, or cause to be made, any manner of vessel, jewel, or any other thing of gold or silver, except it be of good and true allay, that is to say, gold of a certain touch, and silver of the sterling allay, or of better, at the pleasure of him to whom the work belongeth; and that none work worse silver than money. And that no manner of vessel of silver depart out of the hands of the workers, until it be essayed by the wardens of the craft; and further, that it be marked with the leopard's head; and that they work no worse gold than of the touch of Paris. And that the wardens of the craft shall go from shop to shop among the goldsmiths, to essay if their gold be of the same touch that is spoken of before; and if they finde any other than of the touch aforesaid, the gold shall be forseit to the king. And that none shall make rings, crosses, nor locks, and that none shall set any stone in gold, except it be natural. And that

gravers

que ils ont entermaines de veil ouere, que ils seu deliveront a plus tost que ils purront. Et s'ils * achatent desor en avaut de mesme cell' oueraige, que ils lachotent pur defere, et nemy pur revender. Et tous les bones villes Dengleterre, la ou il y ad orfeures, que ils facent per mesme lestatute, come ceux de Londres sont. Et que un veigne de chescun ville pur tous, a Londres, de quer' leur certaine touche. Et si ull' orfeure soit attaint que autrement le face que desuis nest ordeine, soit punie per prison, et per ransome a la volunt le roy. Et en tous les choses desuis dits, et chescun de els voit le roy, et tenend' il et son council, et tous ceux que a cest ordeinment fuerent, que le droit et la seigniorie de la corone saves luy soient per tous, &c. (9)

gravers or cutters of stones and of seals shall give to each their weight of silver and gold (as near as they can) upon their fidelity; and the jewels of base gold which they have in their hands, they shall utter as fast as they can; and from henceforth, if they buy any of the same work, they shall buy it to work upon, and not to sell again; and that all the good towns of England, where any goldsmiths be dwelling, shall be ordered according to this estatute as they of London be; and that one shall come from every good town for all the residue that be dwelling in the same, unto London, for to be ascertained of their touch. And if any goldsmith be attainted hereafter, because that he hath done otherwise than before is ordained, he shall be punished by imprisonment, and by ransom at the king's pleasure. And notwithstanding all these things before-mentioned, or any point of them, both the king and his council, and all they that were present at the making of this ordinance, will and intend that the right and prerogative of his crown shall be saved to him in all things.

(Altered by 8 & 9 W. 3. c. 8. f. 9. and 6 G. 1. c. 11. f. 41. 21 Jac. 1. c. 28. 37 E. 3. c. 7. 2 H. 6. c. 14. 17 E. 4. c. 1. 4 H. 7. c. 2. 18 El. c. 15.)

(1) *Ore de certaine touche.*] The pound of gold and silver containeth 12 ounces: 12 graines of fine gold make a caret, 24 carets of fine gold make an ounce, 12 ounces make a pound of fine gold of the touch of Paris; but by the statute of 18 Eliz. 22 carets fine make an ounce. See hereafter in this chapter. 18 Eliz. cap. 15.

(2) *Et argent del allay de esterling.*] In our law it is called *sterlingum*. For the name of esterling or sterling money there be divers opinions. 37 E. 3. cap. 7.

Our historians thinke it is so called, *ab effigie sturni, aviculæ, quæ in altera parte nummi impressa fuit, nam sturnus anglicè sterling dicitur, &c. vel quod numulus in altera parte haberet notam stellæ, quam Angli ster vocant.* Polid. Virg. fol. 304, &c.

And with the conceit of the sterling agreeth * Linwood the civilian in his glosse upon the provinciall constitutions.

The Scots thinke it should take his name of a towne in Scotland, called Striveling, *alias* Sterling.

* Tit. de testamentis cap. Item quia verbum centum solid. Master Skene.

But

The name.
Hovend. parte
post. anna-
lium. fol. 377. b.
20 E. 1. Vet.
Mag. Chart. 167.
The time.
Dier. 7 El.
fol. 82.
The value.

But the esterling or sterling peny tooke the name of the workmen, being Esterlings, that both coined it, and gave it the allay as the florence of gold is called of the Florentines, and the portagues of the Portugals, &c.

And the esterling penny was first coined by the Esterlings in the reigne of Henry the second; and now money of that allay is counted the lawfull money of England.

20 pence of silver made an ounce, and twelve ounces made a pound of fine silver, and eleven ounces of fine silver, and one ounce of allay maketh a pound weight of sterling silver intended by this act.

By the statute of 18 Eliz. plate of silver ought to be of the fines of xi. ounces two peny weight.

Allay is the mixture of a baser metall then silver or gold, called in our bookes false metall.

And if more allay be put into the money then is limited to them by the indenture between the king and them, or make it of lesse weight, it is treason, and herewith agreeth Britton, treating of treason, where he saith, *Auxy le sefors de nostre money counterfeit, ou plus de allay mys en nostre money que miser ne serra solonque le forme et usage de nostre realme*, and hereunto accordeth Fleta.

The ancient currant silver was the penny: for so I find in the Register in an action of account against a receiver, the plaintife supposed the defendant to be *receptor denariorum*: and when a man wageth his law in an action of debt, the entry is, *quod non debet prefato querenti 4. libras nec aliquem denarium inde*. And at the making of this statute in 28 E. 1. the peny was the currant money of England: it is called in Latine *denarius*, and very aptly to be derived à *numero denario*, as it is taken by us; *quilibet enim denarius argenti valebat 10. denarios æris: denarii dicti, quia denos ære valebant; quilibet denarius puri auri valebat 10. denarios puri argenti*.

Penny in English cometh of the Saxon word pennýg.

In 13 H. 3. there was found by a plowman in tilling the earth money in vessels so ancient, as it was not knowne; the record saith, *De veteri moneta ignota in doliis arando reperta, &c.*

The richest king of England of treasure, that I have read of, was king Henry the seventh, who left at his death in ready mony fifty and three hundred thousand pounds, most of it in faine coine.

(3) *Et que nul oure, peior argent que monie.*] The sense hereof is, that none shall gild worse silver then of the fines of sterling; for such ought the mony to be, and all silver vessell ought to be of the allay of good sterling: for the plate of England is both for the honour, and riches of the realme.

(4) *Tanque il soit assaie per les gardens del miserie.*] This is evident of itselfe.

(5) *Auxy que soit signe dun teste de leopard.*] This is observed to this day: the statute of 37 E. 3. added, that every goldsmith should have his private marke, &c. to the end it may be knowne who made it; besides the surveyors must set their marke; and then an alphabeticall letter must be also set unto it, so as it must have foure markes.

For these matters see the statutes of 2 H. 6. ca. 14. 17 E. 4. ca. 1. 4 H. 7. ca. 2. 18 Eliz. cap. 14.

9 H. 5. stat. 2.
cap. 4. & 6.
3 H. 7. 10. a. b.
3 H. 7. ubi supr.

Brit. fol. 10. b.
Flet. li. 1. c. 22.

What kind of
coine.
Regist. 135.
F.N.B. 82. Stat.
de 31 E. 1. de
ord. mensur. lib.
intrat.

Denarius unde.
[576]

Rot. clauf. an.
13 H. 3.

Rot. clauf. an.
3 H. 8.

37 E. 3. cap. 7.
2 H. 5. ca. 4.
Sta. 2. 2 H. 6.
cap. 14.

37 E. 3. cap. 7.

(6) *Et que nul ne oure peior ore que de touche de Paris.*] Of this sufficient hath been said before.

(7) *Et que nul ne fac' auneux, croix, ne firmeaux.*] This branch is repealed by 21 Jacobi regis, cap. 28. *versus finem.*

(8) *Et nul mett' pier en ore, si il ne soit naturel.*] Counterfeit stones should not be set in gold, to the end that the subject should not be deceived thereby.

(9) *Que le droit et le seignorie de la corone saives luy soient per tous.*] Here is offered just occasion to speake what prerogative the king hath in silver and gold, and first and principally in making of money currant within the realme.

It is said by those that were of counsell with the king in the case of the mines, that it doth pertain to the king onely to put a value to the coine, and to make the price of the quantity, and to put a print to it; which being done, the coine is currant for so much as the king hath limited. Before we speak to this, let us see what our ancient authors and acts of parliament have holden and enacted concerning the monies of England *in genere*, and then shall we the better conceive of this opinion.

Plb. com. 316.

The Mirror treating, *Des articles per weils roys ordeins*, saith thus, *Ordein fuit que nul roy de cest realme ne poet changer sa money, ne im- paier, ne amender, ne auter money faire, que de ore ou d'argent sans las- sent de tous ses counties*, that is, without assent of parliament.

Mirror, cap. 1.
§ 3.

For the better understanding hereof, and of that which shall be said hereafter, it is to be understood, *quod metallorum sunt septem species, viz. aurum, argentum, æs, sive cuprum (sic dictum, quia primo inventum fuit in Cypro) stannum, ferrum, plumbum, et aurichaleum.* Now as to the making of coine these metals by the law of Eng- land are subdivided in *metallum legale, sive verum, et metallum illegi- timum sive falsum.* And this subdivision appeareth both by act of parliament, and by our bookes.

Eucilides, lib. 1.
cap. 1.
Geo. agricol.
lib. 10. cap. 1.

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Quicumque in emptionibus et venditionibus ebulum seu quadrantem le- galis metalli, et debitam habentem formam recusare præsumperit, tan- quam regie majestatis contemptor capiatur, et in carcerem detrudatur. By this act it appeareth, that no subject can be enforced to take in buying or selling, or other payment, any money made, but onely of lawfull metall, that is, of silver or gold, as the Mirror hath told you, and by this it is proved, that having respect to money, there is an unlawfull metall, and these be the other five.

Statutum de di-
missione denari-
orum, an.
20 E. 1. Vet.
Mag. Chart.
fol. 167.

The mony of England is the treasure of England, and nothing is said to be treasure trove but gold and silver. See the third part of the Institutes, cap. *Treasure trove.* And this is the reason that the law doth give to the king mines of gold and silver, thereof to make money, and not any other metall which a subject may have, because thereof money cannot be made. And hereof there is great reason, for the value of money being the measure of all contracts, &c. is in effect the value of every man. And herewith agreeth the booke in 3 H. 7. *Quod ille qui facit monetam contra er- dinationem, &c. allaiatam, viz. alcamino, vel alio falso metallo, præ- ditio est*, where all the said five base metals (as to be put in coine) are deemed false metals. Brañon calleth money made of them *monetam reprobam, et monetam falsam.*

Pl. com. 316. the
point ad judged.
In nummis tria
requiruntur, me-
tallum legale,
pondus, & forma.
3 H. 7. ubi supra.
9 E. 3. cap. 2.
Glanv. lib. 14.
cap. 7.
Bract. lib. 3.
fol. 118.
Flet lib. 1 c. 22.

To omit many things that might be said to the same intent, and to confirme this point with an act of parliament made in the 25

25 E. 3. cap. 13.
9 H. 5. stat. 2.
ca. 6.
See the third part
of the Institutes,
cap. Felony, by
bringing in of
certain coine,
&c.

Rot. Parl.
17 E. 3. nu. 15.

Rot. fin. an.
28 E. 1.
Holl. pag. 309. a.
Walf. an.
28 E. 1.

See Matth.
Paris. 31 H. 2.

Inter leges H. 1.
cap. 11. de jure
regis.

Inter leges
Ethelstani regis,
cap. 14. & Ed-
gari, cap. 8. &
Canuti regis,
cap. 8.
7 E. 2. cap. 12.

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yeare of the reigne of that wise and victorious king Edward the third, in these words: "*Item*, it is accorded, that the mony of " gold and silver which now is currant, shall not be impaired in " weight, or allay, but as soon as a good way may be found, that " the same be put in the ancient state, as in the sterling."

By this act three things are to be observed: 1. That the money of England must either be of gold or silver: 2. That the currant money of England cannot be impaired either in weight or in allay: 3. That the allay of the sterling was the ancient currant mony of England. And herewith agreeth the statute of 9 H. 5.

By an act made, not in print, it is enacted, that silver shall be coined according to the old esterling in poize, and allay, to be currant amongst the subjects, and not to be carried over, on paine of death. And if the Flemings shall coine their silver accordingly, that the same be currant amongst merchants. And that the sterling mony was the ancient currant money of England. That in the reign of E. 1. there were divers white monies called pollards, crocards, staldings, eagles, leonines, and steepings artificially made of silver, copper, and sulphur, and yet currant within the realme; and for that two pieces of those monies were but of the value of one sterling, king E. 1. by his proclamation utterly forbad the same. And yet to look somewhat higher, Matth. Paris 33 H. 3. pag.

Denarius Angliæ qui nominatur sterlingus rotundus sine tonsura ponderabit 12 grana frumenti in medio spicæ, et 20 denarii faciunt unciam, et 12 uncie faciunt libram, &c.

And yet to ascend to former times, *Hæc sunt jura quæ rex Angliæ solus et super omnes habet in terra sua, &c. viz. murdrum, falsaria monetæ suæ, incendium, hamsöckna, forstall, firdinga, flemen firmæ, præmeditat' assultus, roberia, &c.*

But I will desire the studious reader to cast his eyes upon the lawes before the conquest.

Si quis nummum corripuerit, ei manus scelere violata præciditor, eamque prece vel pretio redimi nefas esto, &c.

In dimensione et pondere nihil esto iniquum, ab iniquitate deinceps quisque temperat, &c.

And melting of the good monies of the realme, and altering the same into base coine was deemed in parliament amongst the rest of the calamities that then fell upon this realme. And that the law is this, it is best for the king; for by the impairing of the coine of England either in weight or in allay, the king hath the greatest losse both in his owne revénues, forfeitures, and subsidies, and also in the disvaluation of his subjects: for the king can never be rich, or his kingdomes safe, when his subjects be poore, and the fineness and goodnesse of his coine is *inter magnalia et regalia coronæ.*

25 E. 3. cap. 20.

At the aforesaid parliament of 25 Ed. 3. another excellent law was made in these words: "*Item*, it is accorded and assented, that " the moniers, and other wardens and ministers of the money shall " receive plate of gold and silver by the weight, and not by num- " ber, and in the same manner shall deliver the mony, when it " shall be made, by weight, and not by number, without delay.

Queen Elizabeth (*Angliæ amor*) finding in the beginning of her raigne some copper money, and all too much, and against law al- layed, amongst many others, reformed the same, as upon her tombe in W. stminster it appeareth, *Religio reformata, pax fundata, moneta*

ad suum valorem reducia, classis instructissima apparata, gloria navalis restituta, rebellio extincta, Anglia totos 40 annos prudentissime administrata, ditata, et munita, Scotia à Gallis liberata, Gallia sublevata, Belgia sustentata, Hispania coercita, Hibernia pacata, orbisque terrarum semel atque iterum circumvagatus.

Now for the kings prerogative in the mines or veins of gold and silver (for he hath no prerogative in any other metall) you may reade at large in the case of the mines. If you desire to reade other authorities not cited there *de aurifodinis, argenti fodinis, et aliis mineris*, you may reade Bracton, Fleta, the Register, and other ancient authors, records, and book-cases. And to this you may adde a record which we lately found out.

* *Patrius del Gile & xxvi. alii minetarii apud Aldeneston implacitantur per Henr' de Whiteby, & Joannam uxorem ejus pro eo quod succiderunt arbores suas apud Aldeneston vi & armis, & eas oportaverunt ad valentiam lx.li. &c. Ipsi dicunt quod tenent mineram de Aldeneston ad firmam de dom' rege, & dicunt quod talis est libertas mineræ prædictæ, quòd minetarii ejusdem mineræ possunt capere boscum, cujuscunque fuerit, propinquiorem & utiliorem venæ argenteæ prædictæ mineræ, quam invenire contigerit. Et quod iidem minetarii possint capere pro voluntate sua boscum illum ad mineram illam ardendam & fundendam. Et licitum est eis capere boscum illum ad ædificandum, & ardendum, & claudendum. Et quod licitum est eis boscum illum dare ministris mineræ prædictæ pro stipendiis suis. Et etiam licitum est divitibus ejusdem mineræ dare pauperibus de bosco illo ad sustentationem suam quantum voluerint. Et dicunt, quòd, quia prædictus boscus fuit propinquior & utilior cuidam venæ quam ipsi invenerunt, ipsi succiderunt boscum prædictum ad comburendam, & fundendam mineram prædictam, & ad ædificandum, claudendum, & ad dandum pauperibus & ministris ejusdem mineræ pro stipendiis suis, sicut prædictum est. Dicunt etiam, quod non est licitum aliquibus dominis boscorum postquam ep'i minetarii inceperint succidere in boscis illis ad mineram prædictam, sicut prædictum est, aliquid de boscis illis vendere, nec dare, nisi tantum inde capere rationabilia esto-veria sua. Et dicunt quòd ipsi & antecess. sui, nomine domini regis in boscis vicinis quorumcunque fuerint ad mineram tali libertate usi sunt à tempore quo non extat memoria, unde bene advocant quod ipsi succiderunt prædictum boscum ratione ejusdem libertatis, & non contra pacem, &c. Et Henr' & Joan' bene cognoscunt quòd licitum est minetariis prædictis capere de propinquieribus & utilicribus boscis ad mineram regis ardendam & fundendam, set dicunt, quòd, ultra necessaria sufficientia ad mineram illam ardendam & fundendam, vi & armis boscum suum ad valentiam xl.li. succiderunt, vendiderunt, et asportaverunt, de quo nihil proficui ad mineram regis devenit, nec ad ejusdem mineræ promotionem. Et quod ita sit, petunt quod inquiratur; unde si boscus ille et alii de partibus illis destruuntur, & ad aliqua alia inde facienda, quam ad mineram prædictam comburendam & fundendam, hoc erit ad dampnum domini regis; pet' judic' si minetarii prædicti ad præmissa quæ allegant, cum in manifestum dampnum domini regis redundant, admitti debeant, &c. cum destructis boscis illis cessabit mineræ illius proficuum, &c. dies dat' est in tres Pasch', &c.*

Modo reddit Oxenford lx.li. ad numerum de 20 in ora, (i.) ad numerum de xx.d. in uncia, sic interpretatur in lib. abbatiæ de Burton in com' Staff.

Pl. com. in the case of the mines, fol. 314, &c.
Bract. lib. 2. fol. 122. b. Flet.
lib. 4. cap. 19.
Glanvil. lib. 14. cap. 2. Mich.
33 E. 1. rot. 126.
coram rege,
Derby. Rot.
Parl. 3 R. 2.
nu. 43. Regist.
165. 21 E. 3.
fol. 60. 27 aff.
19. 43 E. 3.
35, &c.
* Mich. 18 E. 1.
in banco rot.
139. Cumberl.
Minera argent.
de Aldeneston.
Libertates mineræ.

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Domesday Oxenford 2 r. ora
Oxenford. & ibi sepe.
Mich. 37 H. 3.
rot 4
a Dux horæ quæ valent 32 d.

* Moneta unde.

Isidor. lib. 16.

Ethic. cap. 17.

b Pecunia unde.

c Unde æs, vide

Cæsars Com-

men.

d Argentea pe-

cunia quando.

e Aurea quando.

f Nummus unde.

* Moneta appellata est, quia nos monet ne qua fraus in metallo vel pondere fiat: b Pecunia à pecudibus est appellata, sicut à jurando iumenta dicta sunt, quia in pecudibus universa antiquorum substantia constabat: antiquissimi non dum auro et argento invento, c ære utebantur, nam prius ærea pecunia in usu fuit, postea d argentea, deinde e aurea subsequuta. Sed ab ea quæ incepit nomen retinuit, unde ærarium dicitur, quod prius æs fuit in usu. Hæc Isidorus.

f Νόμισμα ἀπὸ τοῦ νόμος, hoc est, à lege o in v commutato, quia cum antea permutatione mercium homines uti solerent lege, lege usus nummi introductus est. Some deriveth it, à Numa Romanorum rege, quia ipse primus imaginibus notavit, et titulo nominis sui præscripsit. Others imagine, quod dicitur nummus, è quod nominibus effigieque signatur.

Panis Wasstelli de Ferlingo, (i.) quadrantis, derivatur à verbo Saxonico peopbling, per contractionem ferling.

Where you reade de auri fodinis et argenti fodinis, it is affirmed by merchants that have travelled for gold, that there are silver mines, that is, there is oare or foile of silver digged out of the earth, and out of that by art is silver tried, but there is no oare or foile of gold, but it is gold originally in smaller pieces as it were dust, which being washed downe to the shoare, it is found by the yellownesse of the water. And this is confirmed by Job; for he saith, *Habet argentum venarum suarum principia, et auro locus est in quo conflatur*: surely, there is a veine for the silver, and a place for gold where they finde it. And soon after, *locus sapphiri lapides ejus, et glebre illius aurum*: the stones of it are a place of sapphires, and the dust of it is gold. And yet for distinction sake it is called *aurifodina*.

For *stannum*, tinne, England hath of ancient time furnished other countries, both farre and neare, as you may reade in Diodorus Siculus, who lived in Augustus time. But Polibius, who wrote about two hundred yeares before him, affirmed this island to be abundantly stored with tinne; and we have taken the greater liberty herein (to delight, if we could, the reader) for that herewith we conclude this last chapter of this excellent parliament.

Ferlingus unde,
Stat. de 51 H. 3.
Asisa panis, &c.

Jobi, ca. 28.
ver. 1. & ver. 6.

Diodorus Siculo-
lus, lib. 5. ca. 8.
fol. 142. b.
Polibius, lib. 3.

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STATUTUM DE ASPORTATIS RELIGIOSORUM,

Editum Anno 35 Edw. I. apud Carliolen.

NUPER ad notitiam domini regis ex gravi querela magnatum, procerum, et aliorum nobilium regni (1) sui pervenit; quod cum monasteria, prioratus, et domus religiosæ (2) ad laudem et honorem Dei, et ad exaltationem sanctæ ecclesiæ per regem et progenitores

OF late it came to the knowledge of our lord the king, by the grievous complaint of the honourable persons, lords, and other noblemen of his realm, that whereas monasteries, priories, and other religious houses were founded to the honour and glory of

progenitores suos, et per dictos magnates, nobiles, et eorum antecessores fundata fuissent, et terræ et tenementa quæ plurima essent data per ipsos dictis monasteriis, prioratibus, et domibus, ac viris religiosis in eisdem Deo serviens, ut in hujusmodi monasteriis, prioratibus, et domibus religiosis, tam clerici quam laici admitterentur, secundum suarum sufficientiam facultatum; et infirmi ac debiles sustentarentur, hospitalitates, eleemosynarum largitiones, et alia pietatis opera exercerentur; et pro animabus fundatorum prædictorum, et hæredum suorum fierent in eisdem: abbates, priores, et custodes eorumdem domorum, et quidam eorum superiores alienigenæ (3), utpote abbates, et priores Clunacen', et Præmonstraten', et sanctorum Augustini et Benedicti ordinum, et cæteri qui plures alterius religionis et ordinis noviter per singula monasteria, et domos eis subiecta in Anglia, Hibernia, Scotia, et Wallia (4) diversa tallagia, census, et impositiones insolitas graves, et importabiles (5), domino regi et magnatibus suis inconsultis, fieri statuerunt, et pro suo libito ordinaverunt, contra leges et consuetudines dicti regni (6). Ex quo fit, ut numerus religioforum et aliorum servitorum in hujusmodi domibus et locis religiosis per tallagia hujusmodi, census, et impositiones oppressis, minuitur cultus divinus (7), et eleemosynæ pauperibus, infirmis, et debilibus subtrahuntur, et salutés vivorum, et animæ mortuorum miserabiliter defraudantur: hospitalitates, eleemosynarum largitiones, ac cætera cessant opera pietatis, sicque quod olim in usus pios, et ad divini cultus augmentum charitative fuerat erogatum, jam in censum reprobum est conversum (8). Unde præterea, quæ

[581] prætermittentur, scandalum non modicum crescit in populo, et damna innumera, et exhereditatem fundatorum prædictorum, et hæredum suorum, præcui dubio pervenisse

of God, and the advancement of the holy church, by the king and his progenitors, and by the said noblemen and their ancestors, and a very great portion of lands and tenements have been given by them to the said monasteries, priories, and houses, and the religious men serving God in them, to the intent that clerks and laymen might be admitted in such monasteries, priories, and religious houses, according to their sufficient ability, and that sick and feeble men might be maintained, hospitality, almsgiving, and other charitable deeds might be done, and that in them prayers might be said for the souls of the said founders and their heirs; the abbots, priors, and governours of the said houses, and certain aliens their superiours, as the abbots and priors of Cisterciens, and Premonstratens, and of the order of St. Augustine, and St. Benedict, and many more of other religion and order, have at their own pleasures set divers unwonted, heavy and importable tallages, payments, and impositions upon every of the said monasteries and houses in subjection unto them in England, Ireland, Scotland, and Wales, without the privity of our lord the king and his nobility, contrary to the laws and customs of the said realm; and thereby the number of religious persons, and other servants in the said houses and religious places being oppressed by such tallages, payments, and impositions, the service of God is diminished, alms being not given to the poor, the sick, and feeble, the healths of the living and the souls of the dead be miserably defrauded, hospitality, almsgiving, and other godly deeds do cease; and so that which in times past was charitably given to godly uses, and to the increase of the service of God, is now converted to an evil end; by permission whereof there groweth great

venisse noscuntur: et adhuc verissimiliter præsumuntur pervenire, nisi tantis et tam gravibus detrimentis celeri et salubri remedio obviatur. Considerans igitur præfatus dominus rex sibi et populo suo valde fore damnosum, si tam grandes læturas et insolentias sustineret diutius sub dissimulatione transire.

Volensque idcirco monasteria, prioratus, et alias domos religiosas, et loca in regno et terris dominio suo subiectis constituta secundum voluntatem et pia vota fundatorum ipsorum manutenere et defendere, et contra huiusmodi oppressiones de congruo remedio providere de cætero, ut tenetur de consilio comitum, baronum, magnatum, procerum, et aliorum nobilium, et regni sui communitatum in parlamento suo (9) apud Westmonast' die dominica proxima post festum Sancti Matthei apostoli anno regni sui 33. habito ordinavit et statuit, ne quis abbas, prior, magister, custos, seu quivis alius religiosus, cuiuscunque conditionis, aut status seu religionis exstat sub potestate et jurisdictione sua constitutus, censum aliquem per superiores (10) suos abbates, priores, magistros, custodes religiosarum domorum, vel locorum impositum, vel inter se ipsos aliqualem ordinatum extra regnum et dominium suum sub nomine redditus, tallagii, apporti seu impositionis cuiuscunque, vel alias nomine excambii, venditionis mutui, vel alterius contractus quocunque nomine censeatur, per se vel mercatores, aut alios clam vel palam, arte vel ingenio defer' vel transmittat, seu deferri faciat quoquo modo, nec etiam ad partes externas se divertat causa visitationis, aut alio colore quæsito, ut sic bona monasteriorum et domorum suarum extra regnum et dominium prædictum abducant. Et si quis contra præsens statutum venire præsumpserit, considerata qualitate delicti, et regie prohibitionis pensato

scandal to the people, and infinite losses and disheritances are like to ensue to the founders of the said houses and their heirs, unless speedy and sufficient remedy be provided to redress so many and grievous detriments. Wherefore our foresaid lord the king, considering that it would be very prejudicial to him and his people if he should any longer suffer so great losses and injuries to be winked at,

And therefore being willing to maintain and defend the monasteries, priories, and other religious houses erected in his kingdom, and in all lands subject to his dominion, and from henceforth to provide sufficient remedy to reform such oppressions, as he is bound by the counsel of his earls, barons, great men, and other nobles of his kingdom in his parliament holden at Westminster, in the five and thirtieth year of his reign, hath ordained and enacted, that no abbot, prior, master, warden, or other religious person, of whatsoever condition, state, or religion he be, being under the king's power or jurisdiction, shall by himself, or by merchants or others, secretly or openly, by any device or means, carry or send, or by any means cause to be sent, any tax imposed by the abbots, priors, masters or wardens of religious houses their superiors, or assessed amongst themselves, out of his kingdom and his dominion, under the name of a rent, tallage, or any kind of imposition, or otherwise by the way of exchange, mutual sale, or other contract howsoever it may be termed; neither shall depart into any other country for visitation, or upon any other colour, by that means to carry the goods of their monasteries and houses out of the kingdom and dominion aforesaid. And if any will presume to offend this present statute, he shall be grievously punished according to the quality of his offence, and

pensato contemptu, graviter puniatur (11).

Præterea inhibet præfatus dominus rex omnibus et singulis abbatibus, prioribus, magistris, et custodibus religiosorum domorum et locorum, alienigenis quorum potestati, subjectioni, et obedientiæ domus eorumden ordinum in regno et dominio suo existentes, subdunt, ne de cætero tallagia (12), census, impositiones, apporta, seu alia quæcunque onera aliquibus

[582] *monasteriis, prioratibus, seu aliis domibus religiosis eis (ut prædicitur) sic subiectis imponant, seu faciant aliququaliter assidere, et hoc sub foris factura omnium, quæ in potestate sua obtinent, et foris facere poterunt in futurum (13).*

Et insuper ordinavit dominus rex et statuit, quod abbates Cisterci, et Præm' ordinum (14) aliorum religiosorum, quorum sigillum in custod' abbatis, et non conventus, prius residere tantummodo consuevit, de cætero habeant sigillum commune, et illud in custod' prioris monasterii seu domus et quatuor de dignioribus, et discretioribus ejusdem loci conventus, sub privato sigillo abbatis ipsius loci custod' deponend'. Ita quod abbas, seu prior domus cui præest, per se contra aliquem seu oblig' nullatenus possit firmar', sicut hætenus fieri consuevit. Et si forsan aliqua scripta oblig' donationum, emptionum, venditionum, alienationum, seu aliorum quorumcunque contract' alio sigillo, quam tali sigillo communi, sicut præmittitur custodito, inveniantur à modo sigillata, pro nullis penitus habeantur, omnique careant firmitate. Cæterum intentionis domini regis non existit (15) abbates, priores, et alios religiosos alienigenas per ordinationes et statuta expressa superius ab officio visitationis in regno et in dominio suo exercendo excludere, quin per se ipsos vel alios, monasteria et alia loca eis in regno et in dominio suis prædictis subiecta, juxta officii sui debitum in his duntaxat

and according to his contempt of the king's prohibition.

Moreover, our foresaid lord the king doth inhibit all and singular abbots, priors, masters and governors of religious houses and places, being aliens, to whose authority, subjection, and obedience the houses of the same orders in his kingdom and dominion be subject, that they do not at any time hereafter impose, or by any means assess any tallages, payments, charges, or other burdens whatsoever, upon the monasteries, priories, or other religious houses in subjection unto them (as is aforesaid) and that upon pain of all that they have or may forfeit.

And further, our lord the king hath ordained and established, that the abbots of the orders of Cistercienses and Premonstracenses, and other religious orders, whose seal hath heretofore been used to remain only in the custody of the abbot, and not of the covent, shall hereafter have a common seal, and that shall remain in the custody of the prior of the monastery or house, and four of the most worthy and discreet men of the covent of the same house, to be laid up in safe keeping under the private seal of the abbot of the same house; so that the abbot or prior, which doth govern the house, shall be able of himself to establish nothing, though heretofore it hath been otherwise used. And if it fortune hereafter, that writings of obligations, donations, purchases, sales, alienations, or of any other contracts, be sealed with any other seal than such a common seal, kept as is aforesaid, they shall be adjudged void and of no force in law. But it is not the meaning of our lord the king to exclude the abbots, priors, and other religious aliens, by the ordinances and statutes aforesaid, from executing their office of visitation in

duntaxat quæ ad observantiam regularem, et ordinis sui disciplinam pertinent, libere valeant visitare. Proviso quod illi qui officium hujusmodi visitationis exercuerint, nihil de bonis aut rebus hujusmodi monasteriorum, prioratuum, et domorum extra præregnum et dominium, præter rationabiles et moderatas eorum expensas, deferant, vel deferri procurant.

Et licet ordinationum et statutorum præscriptorum pronunciatio, et publicatio à parlamento proximo præterito (16) usq; ad præsens parlamentum apud Carlisium in octabis Sancti Hilarii, anno regni ejusdem regis Edwardi 35. certis ex causis, et ut cum majore deliberatione et maturitate procederent (17), remanserit in suspensio, dominus rex post deliberationem plenariam et tractatum cum comitibus, baronibus, proceribus, et aliis nobilibus et comitibus regni sui habitum in præmissis, de consensu eorum unanimi et concordia ordinavit et statuit, ut ordinationes et statuta prædicta

[583] sub forma modis et conditionibus supra contentis à primo die Maii prox' futur' in antea inviolabiliter observentur perpetuis temporibus valitura: quodque transgressores ipsorum pænis extunc subjaceant annotatis.

his kingdom and dominion; but they may visit at their pleasures, by themselves or others, the monasteries and other places in his kingdom and dominion in subjection unto them, according to the duty of their office, in those things only that belong to regular observation, and the discipline of their order. Provided, that they which shall execute this office of visitation, shall carry, or cause to be carried out of his kingdom and dominion, none of the goods or things of such monasteries, priories, and houses, saving only their reasonable and competent charges.

And though the publication and open notice of the ordinances and statutes aforesaid was stayed in suspension for certain causes sithence the last parliament, until this present parliament holden at Carlisle in the octaves of Saint Hilary, in the five and thirtieth year of the reign of the same king Edward, to the intent they might proceed with greater deliberation and advice; our lord the king, after full conference and debate had with his earls, barons, nobles, and other great men of his kingdom, touching the premises, by their whole consent and agreement hath ordained and enacted, that the ordinances and statutes aforesaid, under the manner, form, and conditions aforesaid, from the first day of May next ensuing, shall be inviolably observed for ever, and the offenders of them shall be punished as is aforesaid.

(25 Ed. 3. stat. 6. Hob. 148. 3 Bulstr. 45. 5 Ed. 3. c. 3. 4 Ed. 3. c. 6. 8 Rep. 118.)

The reason wherefore this parliament was holden at Carlisle, appeareth by the writ of parliament directed to the lords, viz. *Quia super ordinationem et stabilimentum terræ nostræ Scotia, necnon et aliis negotiis n. s. et statum regni nostri specialiter tangentibus, apud Carlisium in octab' sancti Hilarii proxim' futur' parlamentum tenere, &c.*

There were two mischiefs before the making of this act, but both of them tended to one end, viz. the grievous oppression of churches

churches and monasteries; the one from the pope, the other mentioned in the preamble.

For the first, *In hoc parlamento per majores graves depositæ fuerunt querimonie de oppressionibus ecclesiarum, et monasteriorum multiplicibus, et extortionibus pecuniarum per clericum domini papæ, magistrum Wil^m testa noviter in regno induitum: præceptum est eidem clerico de assensu comitum et baronum, ne de cætero talia exequatur*; for the king and the lords adjudged it unjust, that the pope should take any profit of the houses of their foundation: and therefore this act dealeth not herewith, but the lords prohibited his collector, and left the party grieved to his remedy by prohibition, or other remedy by law, as had been before, and after was used, as by the records and authorities quoted in the margin (amongst many others) which are worthy your reading, more at large appeareth: and so much for that first mischief. The other mischief appeareth at large in the preamble, wherein the pope, having so great power over the abbots and priors aliens, had a hand for his owne benefit.

* The commons complaine against provisions coming from Rome, whereby strangers were enabled within this realme to enjoy ecclesiasticall dignities, &c. by meanes whereof daily almes was decayed, the treasure of the realm transported, the secrets of the realme discovered, and the clerkes within the realme impoverished; and that the pope had in most covert wise granted to two new cardinals sundry ecclesiasticall livings within the realm, and namely, to cardinall Paragots above 10,000 marks yearly tax: they therefore require of the king and lords some remedy, for that they neither could, nor would any longer beare those strange oppressions, or else to help them to expell out of this realme the popes power by force. The answer of the king was, that he understood well these mischiefs, and willeth, that between the lords and commons some remedy might be found, whereunto he might assent: hereupon the lords and commons sent for this act of 35 E. 1. upon the like complaint, thereby forbidding, that any thing should be attempted, or brought into the realme, which should tend to the blemishment of the kings prerogative, or in prejudice of his lords or commons, and so at that time, upon consideration had of this act of 35 E. 1. and for further remedy, an act of provision was made.

Also the statute of 25 E. 3. made against provisions, reservations, &c. reciteth this statute of 35 E. 1. and grounded that act upon the same. So as this act (as you may perceive) hath been of very great and high account. And now let us peruse the words thereof.

(1) *Ex gravi querela magnatum, procerum, et aliorum nobilium regni.*] It is recited by the said act of 25 E. 3. that this act of 35 E. 1. was made at the petition of the commonalty of the realme, and here it is said, *ex gravi querela magnatum, &c.* and yet both stand well together; for knights of the thire, and other gentlemen of the house of commons are included under these words, *aliorum* * *nobilium*: for *nobilitas est duplex, superior et inferior*; superior belongeth to the lords of parliament, and inferior to knights and gentlemen of name and blood, who are in this act termed *nobiles*.

(2) + *Quod cum monasteria, prioratus, et domus religiosæ, &c.*] Here is rehearsed the end of the erection of religious houses, viz. *ad laudem et honorem Dei, et exaltationem sanctæ ecclesiæ per regem, et progenitores*

Rot. clauf.
17 H. 3. m. 37.
Rot. Franc'
16 H. 3. Rex,
&c. Justic' suis
de banco.
29 H. 3. tit. 3. á
tergo. 59 E. 3.
tit. 22. á tergo.
48 E. 3. tit. 33.
Bract. lib. 4.
fol. 250. b. Rot.
Parl. 50 E. 3.
nu. 64, &c. to
the 117. 51 E. 3.
nu. 78. Rot.
Parl. 13 R. 2.
nu. 43. 2 H. 2.
fol. 10, &c.
4 H. 4. rot.
clauf. m. 11.
* Rot. Parl.
17 E. 3. nu. 59.

25 E. 3. stat.
unic.
* 25 E. 3. de
provisor' per la-
sent des counts,
barons, & auters
nobles.
9 E. 3. cap. 2.
27 E. 3. stat.
stat. per les pre-
lates, counts,
barons, & auters
grandeas des
counties, &c.
Vid. 9 E. 2. stat.
of shrieves.
7 E. 1. de Re-
ligiosis. W. 2. in
the preamble.

+ [584]

genitores suos, et per dictos magnates, et nobiles, et eorum antecessores fundata fuissent, &c.

4 R. 2. nu. 13.

Rot. Parl.

1 R. 2. nu.

& 13 R. 2. nu.

19. rot. parl. an.

4 H. 4. nu. 23.

& 43. 1 H. 5.

cap. 7. & Rot.

Parl. 1 H. 5. nu.

38. 22 E. 4. 44.

38 H. 6. 34.

21 H. 7. fol. 1.

&c. 13 E. 3.

264. 14 E. 3. 21.

20 E. 3. annuity

24. 40 E. 3. 10.

27 aff. 48.

14 H. 4. 37.

22 E. 4. 44.

21 H. 7. 7.

7 R. 2. cap. 12.

13 R. 2. cap.

1 H. 5. ca. 7.

(3) *Quidam eorum superiores alienigenæ.*] It appeareth in a parliament roll, that the clergy, (whereof priors aliens were part) had a third part of the possessions of the realme. These abbots, priors, and prioresses aliens were justly complained of, as by this act appeareth, and many times upon like complaints faire promises were made for reformation, but no amendment could be had, till they were taken away, and their possessions given to the king by act of parliament. See the parliament rolls of 4 H. 4. and 1 H. 5.

Note, these priors, and prioresses aliens were Normans, and French men, and in time of warre with France, the king by the common law might and did seise the possessions of the priors aliens within this realm into his hands, without any office, &c. See the statutes of 7 R. 2. 13 R. 2. 1 H. 5. against Frenchmen and aliens, to receive or have any benefice in England.

(4) *In Anglia, Hibernia, Scotia, et Wallia.*] For Scotland, &c. see divers records and authorities in law, Rot. Parl. Pasch. 21 E. 1. rot. 1. & rot. 2. *magnum placitum inter regem de Norway, et regem Scotiæ.* Rot. Vasc. 22 E. 1. m. 23. Trin' 25 E. 1. coram rege, rot. 6. Norff. Robertus de Tony, &c. Mich. 33 E. 1. coram rege, rot. 127. Scotia. 28 E. 1. the letters of all the nobility of England in the name of themselves, and of the whole commonalty in parliament assembled to the pope, a duplicat whereof under the seales remaine in the exchequer, which we have seen, and a copy whereof we have. In the same yeare reade also the kings letters to the pope, which Walsingham rehearseth, pag. 49. and the lords letters, pag. 54. Reade also Walsing. pag. 17. &c. where many more authors be cited, and pag. 31, 32. 121. 138. & Matth. Westm' pag. 420. 428. 443. 452, &c. Holl. fol. 116, 117. Policron. lib. 7. cap. 39. Stow, 303. Fox, 269. 341. Rot. Parl. 14 E. 3. nu. 13. Stat. 2. & 42 E. 3. nu. 7. See in the parliament rolls, in every parliament *petitiones Scotiæ.* Rot. pat. 10 E. 3. 2. part comes Arundel, &c. Brit. fol. 25. a. b. 6 E. 3. 18. 1 E. 3. 17. per Cant' 8 R. 2. cont' claim 13. 7 H. 4. corody 7. 13 H. 4. 4. & 5. 8 H. 5. 4. 7 E. 4. 27. Fortescue, fol. 17. Pl. com. 126. Dier, 13 El. in manuscript.

(5) *Diversa tallagia, census, et impositiones insolitas, graves et importabiles, &c.*] See the exposition upon the statute of Magna Charta, cap. 30. when the king began to use the word of imposition; but here is the first statute that we remember, wherein this word imposition was used; and observe well from whom it came; and therefore here these impositions be called *insolita*, and this word *noviter*, &c. expresseth so much; and because they were unaccustomed and newly imposed, they were *graves* and *importabiles*, and against the lawes and customes of the realme.

(6) *Contra leges et consuetudines dicti regni.*] Here it appeareth, that tallages, assessments, or impositions, set by any superiour, foreigner, or other, ecclesiasticall or temporall, upon his inferiour, or any other, though they have never so faire pretexes, as to recover the holy land, &c. are against the law and custome of the kingdome of England.

And here it is to be observed, how this act hath since the 17 yeare of E. 3. been dealt withall; for at that yeare a branch of this statute was recited, that forbad that any thing should be attempted or brought

12 H. 7. cap. 6.
accord.

Rot. parl.

17 E. 3. ubi

supra. nu. 59.

brought into the realme, which should tend to the blemishment of the kings prerogative, or in prejudice of his lords and commons, which now is wholly omitted,

*Accipe nunc horum insidias, et crimine ab uno
Disce omnes———*

(7) *Minuitur cultus divinus, &c.*] That acts of parliament have been made at the petition sometime of the nobles, many times of the commons, and of the lords and commons in causes ecclesiasticall for the honour of God, for advancement of divine worship, for the instruction of Gods people, and maintenance of workes of piety, and the like, appeareth in this act, and in many other acts of parliament: for *reges qui serviunt Christo, faciunt leges pro Christo*. To omit the ancient statutes made in parliament before the conquest of master Lamberts edition, we will recite some few which shall suffice in a matter so frequent and evident, W. 2. 13 E. 1. cap. 43. 21 E. 3. fol. 60. the bishop of Norwich his case, 25 E. 3. cap. 22. 25 E. 3. *stat. de provisoriis*, 27 E. 3. cap. 1. 36 E. 3. cap. 8. 38 E. 3. *stat. 2. cap. 1. & cap. 4.* 45 E. 3. cap. 3. Rot. parl. 51 E. 3. nu. 13. 3 R. 2. ca. 3. 7 R. 2. cap. 12. 12 R. 2. ca. 15. 13 R. 2. *stat. 2. cap. 2. & 3.* 16 R. 2. cap. 5. 2 H. 4. cap. 3. & 4. 4 H. 4. cap. 12. & 13. 6 H. 4. cap. 1. 7 H. 4. cap. 6. & 8. 9 H. 4. cap. 8. 1 H. 5. cap. 5. 3 H. 5. cap. 4. 2 H. 5. cap. 3. 2 H. 5. *stat. 2. ca. 2.* 4 H. 5. ca. 6. 3 H. 7. cap. 6. 11 H. 7. cap. 8. and generally, all statutes that take away priviledge and benefit of clergy and sanctuary.

(8) *Sic quod olim in usus pios, et ad divini cultus augmentum charitativè fuerat erogatum, nunc in censum reprobum est conversum.*] If it be observed of whom they are spoken, these words are sharp and bitter: for, as a reprobate is *abjectus et creatus diabolo*, so a reprobate sene is an abject and damned sene, and the like is frequent in parliaments, when any thing is attempted or done against the honour of God, the prerogative and dignity of the king, the lawes of the realme or the common-wealth.

* The pope, for divers usurpations, is called the common enemy to the king and the realme.

^a By brocage and unlawfull meanes the pope receiveth so much of ecclesiasticall dignities in this realme, as is more then the kings warres, who then was, and of long time had been in an open and chargeable warre with France.

^b Note, in the roll of parliament of the statute of provisors, there are more sharp and biting words against the pope, then in the print, a myserie often in use, but not to be knowne of all men.

^c That the brocars of the sinfull city of Rome for money promote many caistifes, being altogether unlearned, and unworthy, to a thousand markes livings yearly, where the learned and worthy can hardly obtaine twenty markes, whereby learning decayeth.

(9) *De concilio comitum, baronum, magnatum, procerum, et aliorum nobilium, et regni sui comitatum in parlamento suo, &c.*] Here the prelates are omitted, and this statute was made by the king, the nobles, and the comminalty; and it is objected, that therefore this is no act of parliament, and for authority of the roll of parliament in 21 R. 2. is cited, where it is said, that divers judgements were heretofore undone, for that the clergy were not present. To this some have

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Lib. 11. f. 73. b.
Magd. Coll. case.

Rot. Parl.

* 18 E. 3. *stat. 1.*
nu. 38. Vid.

17 E. 3. nu. 59.

^a 25 E. 3. nu. 13.

^b 38 E. 3. ca. 19.

2, 3, 4.

^c Rot. parl.

50 E. 3. nu. 96.

Rot. parl. 18 E.

3. nu. 31. *stat. 2.*

Rot. parl. 51 E. 3.

nu. 13. 3 R. 2.

c. 3. & Rot. parl.

nu. 37. 6 H. 4.

^c 1. of the horrible mischeries

and damnable

customs intro-

duct of new into

the court of

Rome, &c.

3 H. 5. nu. 11.

have answered, that a parliament may be holden by the king, the nobles, and commons, and never call the prelates to it: but we hold the contrary to both these, and shall make it manifest by records of parliament, wherein for the better understanding hereof, we will observe this order: first, that the bishops ought to be called to parliament: secondly, where acts of parliament are good without them: and lastly, that this act of 35 E. 1. is an act of parliament.

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To the first, every bishop hath a barony, in respect whereof, *secundum legem et consuetudinem parliamenti*, he ought to be summoned to the parliament as well as any of the nobles of the realme: and likewise 26 abbots, and two priors had baronies, and thereby were also lords of parliament; and when the monasteries were dissolved, the lords house lost so many members that had voices in parliament. But seeing it was done by authority of parliament, it was no impeachment to the proceedings in parliament.

To the second, if they voluntarily absent themselves, then may the king, the nobles and commons make an act of parliament without them, as where any offender is to be attainted of high treason, or felony, and the bishops absent themselves, and the act proceed, the act is good and perfect.

Likewise if they be present, and refuse to give any voices, and the act proceed, the act of parliament is good without them.

Also where the voices in parliament ought to be absolute, either in the affirmative or negative, and they give their voices with limitation or condition, and the act proceeds, the act is good; for their conditionall voices are no voices.

Of every of these we will produce examples out of the records and rolls of parliament.

Dors. clauf. an.
15 E. 2 m. 25.

See Vet. Magn.
Chart. 2. part
fol. 56.

At a parliament holden *à die natiuitatis Sancti Iohannis Baptiste*, in 3 *septimanas* anno 15 E. 2. the prelates, countes, barons, and commons of the realme charge Sir Hugh Spencer the father earle of Winchester, and Hugh his sonne earle of Gloucester with many high and hainous offences, as the act called *exilium Hugonis Lespencer patris et filii*; the earles and barons, peeres of the realme, in the presence of the king pronounce judgement against them, as by the act appeareth: and after at a parliament holden at York, *à die Pasche* in 3 *septimanas*, the said judgement and attainer against them (by the kings exorbitant favour towards them, whose favourites they were) was adnulled; and one of the causes was, for that the said judgement was given without the prelates, whereas the same being an act of parliament, and entered in the parliament roll, as other acts at that parliament were, and the consent of the bishops doth manifestly appeare, for that they were parties to the charge, and after it was adjudged by authority of parliament, that the said judgement against them was good, and confirmed the same; so as they that beheld but on the outside of the adnullation, and looked not into all parts of the former act, and knew not the act of 1 E. 3. might say, as the commons said, as is aforesaid, in 21 R. 2.

Dors. clauf. 15 E.
2. m. 13. in
schedula.

1 E. 3. ca. 1.

1 R. 2. Stat. 2. c. 3.
recorde the statute
at la ge.

At the parliament holden in the third yeare of king Richard the second, a bill was exhibited against the clergy with many bitter words, for the ill disposing of the dignities, offices, parsonages, canonries, prebends, and other benefices, whereof they were patrons, and were in their gift, whereof many inconveniences followed; the bishops and other prelates taking great offence at this bill, ab-

sent. d

ſented themſelves, whereupon the king, upon the complaint of his commons, by the advice and common aſſent of all the lords temporall, paſſed the bill.

In the ſame parliament great complaint was made of the extorſions committed by the biſhops and their officers; and thereupon a bill was framed, that juſtices of peace might enquire thereof, and a forme of a commiſſion deſired to be enacted; the prelates and clergy made their proteſtation expreſly againſt the ſaid bill to heare extorſions, &c. tending to the blemiſhing of the liberty of the church, &c. whereunto it was replyed for the king, that neither for their ſaid proteſtation, nor other words in their behalfe, the king would not ſtay to grant to his juſtices in that caſe, and all other caſes, as was uſed to be done in times paſt, and was bound to doe by vertue of his oath done at his coronation, whereupon the act and forme of a commiſſion paſſed as was deſired.

Rot. parl. 3. R. 2.
nu. 38. & 40.
See 7 R. 2. c. 12.

At the parliament holden in the 11 yeare of Richard the ſecond, in the beginning of the parliament holden in that yeare, the archbiſhop of Canterbury made openly in the parliament a ſolemne proteſtation for himſelfe, and the whole clergy of his province, which he deſired might be entred, and ſo it was: the effect whereof was, that albeit they might lawfully be preſent in all parliaments, yet for that in this parliament matters of treaſon were to be entreated of, whereat by the canonick law they ought not to be preſent; they therefore abſented themſelves, ſaving their liberties therein otherwiſe: the like proteſtation did the biſhop of Dureſme and Carlile make. At which parliaments divers ſtatutes were made, nothing concerning life or member, as the 7 chapter concerning merchants, the 8 chapter touching annuities, the 9 chapter againſt new impoſitions, the 11 concerning keeping of aſſiſes, &c. all which were good and perfect ſtatutes, and yet the prelates aſſented not to them.

Rot. parl. 11 R.
2. nu. 9, 10.

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At the parliament holden in the 13 yeare of Richard the ſecond, when the two bill were read, the one intituled a confirmation of the ſtatute of proviſors, and the forfeiture of him that accepteth a benefice againſt that ſtatute; the other intituled the penalty of him that bringeth in a ſommons or ſentence of excommunication of the pope againſt any perſon upon the ſtatute of proviſors, and of a prelate executing it, both which bills tended to reſtraine the popes authority, which he claimed in diſpoſing of eccleſiaſticall promotions within this realme. The archbiſhops of Canterbury and Yorke for the whole clergy of their provinces made their ſolemn proteſtations in open parliament, that they in no wiſe meant or would aſſent to any ſtatute or law in reſtraint of the popes authority, but utterly withſtood the ſame, the which their proteſtations at their requeſts were inrolled, and yet both bills paſſed by the king, lords, and commons, which are in print.

13 R. 2. ca. 2.
13 R. 2. ca. 3.
Vid. 1 H. 5. c. 7.

Rot. Parl. 13 R.
2. nu. 24.

See the ſtatute of 16 R. 2. and many others.

16 R. 2. ca. 5.
Rot. Parliam.
ment 6 H. 6. nu.
27.

It is enacted by the king, lords temporall, and commons, that no man ſhould contract or marry himſelfe to any queen of England, without the ſpeciall licence and aſſent of the king, on paine to loſe all his goods and lands.

The biſhops and clergy being preſent, aſſented to this bill, as farre forth as the ſame ſwerred not from the law of God, and of the church, and ſo as the ſame imported no deadly ſinne, this was holden no aſſent; and therefore it was enacted by the king,

king, lords temporall, and commons, and so specially entred, omitting the prelates.

And thus much as concerning the second article shall suffice.

Rot. Patent.
7 E. 2. r. part
m. 6. 4 E. 3. c. 6.
5 E. 3. ca. 3.
25 E. 3. stat. unic.
and by the re-
cord of parlia-
ment in 17 E. 3.
ubi supra.
20 E. 3. Abb. 14.
27 H. 6. annui-
tie 41.

As to the third point, when an act is specially entred, that it was enacted by the king, the lords temporall, and commons, it must be intended, that the bishops absented themselves, or if they were present, protested against it, or gave such voices as were *contra legem et consuetudinem parliamenti*. And for this act of 35 E. 1. in letters patents made within 8 years after this statute, it is affirmed to be an act of parliament; by foure acts of parliament in the 4 and 5 and 25 yeare of E. 3. the same is holden for an act of parliament, and so it is in 13 R. 2. cap. 2. stat. 2.

(10) *Censum aliquem per superiores, &c.*] This branch is plaine, and needeth no exposition.

(11) *Considerata qualitate delicti, et regie prohibitionis pensato contemptu, graviter puniatur.*] That is, by fine and imprisonment, according to the quality of the offence.

(12) *Ne de cætero tallagia, &c.*] Hereby are all such tallages forbidden.

Vid. stat. de mo-
neta mag. ca. 3.
Vet. Mag. Chart.
fo. 38. 20 E. 3.
cap. 1.

(13) *Et hoc sub forisfactura omnium, quæ in potestate sua obtinent, et forisfacere poterunt in futuro.*] This is the like forfeiture as is given by other statutes in case of *præmunire*, viz. the forfeiture of his lands, which he may forfeit, and of his goods, and to be imprisoned at the will of the king.

(14) *Quod abbates Cisterci et Præmonstr' ordinum, &c.*] This branch (as it hath been resolved) is impossible, and inconvenient to be observed: impossible, because it is hereby enacted that the common seale, &c. should be in the custody of the prior, and of foure of the worthiest and discreetest of the covent, sealed up with the private seale of the abbot, &c. and if any writing, &c. should be sealed with any other seale then with the said common seale so (as is aforesaid) kept in custody, it should be void, &c. for if it be kept in custody under the seale of the abbot, then no writing can be sealed by the abbot, and if the abbot taketh it out, and seale, &c. then is it not kept in custody under his private seale; and therefore it was resolved by the whole court of the common pleas, that this branch, being impossible to be observed, is void; the court also resolved, that it was inconvenient: for they said, that if the statute should be observed, every deed that passed under the common seale might be undone by a simple surmise, &c.

Bracton saith, that *lex est sanctio iusta, iubens honesta, et prohibens contraria*; so as every law must have three qualities: 1. it must be *iusta*: 2. *iubens honesta*: 3. *prohibens contraria*. And if it be *iusta*, it must have five properties: 1. it must be *possibilis*, 2. *necessaria*, 3. *conveniens*, 4. *manifesta*, 5. *nullo privato commodo, sed communi utilitati edita*. And this is grounded upon holy writ, *Legum conditores iusta decernunt. Væ qui condunt leges iniquas, et scribentes injustitiam scripserunt.*

(15) *Cæterum intentio domini regis non existit, &c.*] By this branch the power of visitation is reserved with three restrictions or limitations: 1. *juxta officii sui debitum*, 2. *in his duntaxat, quæ ad observantiam regularem, et ordinis sui disciplinam pertinent*: 3. *provisio quod, &c. nihil, &c. extra præfatum regnum, &c. deferant.*

(16) *Et licet ordinationum et statutorum, &c. à parlamento proxim' præterito.*] That is, at a parliament holden at Westminster,
die

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27 H. 6. annui-
tie 41.
Lib. 8. fo. 118.
Doct. Bonhams,
case.

Bract. li. 1. ca.

Prov. ca. 8.
ver. 15.
Efa. c. 10. ver. 1.

die dominica prox' post festum Sancti Mathæi apostoli, in the 33 yeare of E. 1.

(17) *Cum majore deliberatione et maturitate procederent.*] According to the ancient rule, *deliberandum est diu, quod statuendum est semel.*

STATUTUM DE FRANGENTIBUS PRISONAM.

Editum anno 1 Edw. II.

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DE prizonariis prizonam frangentibus, dominus rex vult et præcipit, quod nullus de cætero, qui prizonam fregerit (1), subeat judicium vitæ vel membrorum (2) pro fractione prizonæ tantum, nisi causa (3), pro qua captus et imprisonatus fuerit, tale judicium requirat, si de illa secundum legem et consuetudinem terræ fuisset convictus, licet temporibus præteritis aliter fieri consuevit.

CONCERNING prizoners which break prizon, our lord the king willeth and commandeth, that none from henceforth that breaketh prizon shall have judgement of life or member for breaking of prizon only, except the cause for which he was taken and imprisoned did require such judgement, if he had been convict thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise.

(3 Inst. 69, 70. Kel. 87. Fitz. Coron. 134.)

At a parliament holden at Westminster *in cro' assumptionis beate Mariæ, anno regni E. 1. 23.* the like act of parliament was made with the like title as this is, *totidem verbis*; and therefore it may be, that it was recited and affirmed at the parliament holden in 1 Ed. 2. which onely is mentioned in our printed bookes.

Inter placita & mem. coram domino rege, anno 23 E. 1.

It appeareth by our ancient authors of the law, that if a prizoner, whatsoever the cause was for which he was committed, had broken the kings prizon, and escaped out, it was felony; because, *interest reip. ut carceres sint in tuto*: but yet it must have been an actuall breaking of the prizon; for if the doore had been open, and he had gone out, or if others without his privy had broken open the prizon doore, &c. and he goeth out, and escapeth, or if the gaoler himselfe had let him out; in these cases it had been no felony, because the prizoners did not actuall breake the prizon. And so it is of a felon that is under custody of the kings officer (which is an imprisonment in law) and divers men doe reiscue or take him by force out of the custody of the kings officer this is felony in them all by the common law. And so doth Hufsey chiefe justice report the case, that in the raigne of Ed. 4. when he was attorney, it was resolved by Billing chiefe justice, Choke, and the judges, that the rescous of a felon, to take him out of custody and prizon, was alwaies felony

Bract. li. 2. fol. Brit. fol. 17. Flet. li. 1. c. 26. Stanf. pl. cor. 30. b.

1 H. 7. fo. 6. a.

by the common law, but of the prisoner himselfe it was not, &c: which must of necessity be intended, when other men did rescue him, or brake open the prison without his privy, and these words in the report (*tanque lestatute fuit fait de frangentibus prisonam*) ought to be omitted.

Forasmuch as every man desireth to be at naturall liberty, the Mirror complaines of the common law in this point, and saith, *abuson est a tener escape de prisoner, ou de bruserie del gaole pur peche mortell, car cel usage nest garrant per nul ley, ne in nul part est use forsque in cest realme, et en France, eins est leu garrantie de ceo faire per la ley de nature. Hoc ille.*

Mirr. ca. 5. § 1.

^a 1. aff. p. 6.

1 E. 3. 17.

3 E. 3. coro. 312.

22 E. 3. ib. 251.

^b 11 E. 2. det.

172. 13 E. 3.

barr. 153. 27 aff.

27. 8 H. 4. 18.

20 E. 4. 5.

Brit. 72. 5 H.

4. cap. 10.

* 22 E. 3. coron.

250. 8 E. 2. ibid.

419. 23 H. 8. ca.

11. 1 E. 6. c. 12.

† [590]

1. aff. p. 6. 3 E. 3.

coron. 333. Fitz.

Justice of Peace,

fol. 23.

15 H. 7. 1. 2.

Pl. com. fo. 13.

(1) *Nullus de cætero qui prisonam fregerit.*] *Nota*, ^a he that is in the stockes, or under lawfull arrest, is said to be in prison, although he be not *infra parietes carceris*: and therefore this branch extendeth as well to a prison in law, as to a prison in deed. ^b Albeit divers lords of liberties have custody of the prisons, and some in fee, yet the prison it selfe is the kings *pro bono publico*: and therefore it is to be repaired at the common charge: for no subject can have the prison it selfe, but the king only: and therefore Britton, *ubi supra*, speaking of the kings prison, doth include all prisons. * For that which was called the bishops † prison, see the statutes of 23 H. 8. and 1 E. 6. This (*fregerit*) is intended an actuall breaking of prison as hath been said.

If the sherife have a *capias* upon an inditement of felony against A. and coming to arrest him, is so disturbed, that he cannot arrest him, this is no felony; for A. was never in prison: and therefore prison in that case could not be broken.

In some cases it is lawfull for the prisoner to break prison both at the common law, and notwithstanding this statute: as if the prison be set on fire, either by lightning or otherwise, unlesse it be by the privy of the prisoner, he may break prison for safeguard of his life. *Et sic in similibus.* For, *quodcunque aliquis ob tutelam corporis sui fecerit, jure id fuisse videtur.* But it must be, *inevitabilis necessitas.*

(2) *Subeat judicium vite vel membrorum.*] These words at the making of this act extended as well to treason as to felony. In 2 H. 6. it was enacted to continue till the next parliament, that if any be indited, appealed, or taken for suspicion of high treason, and breake the same prison, it should be high treason. And the reason of that act was, because that by the statute of 25 Ed. 3. *de proditiōibus*, no other offence then is therein mentioned can be adjudged high treason, untill it be declared by act of parliament; and therefore that act of parliament being in the negative, if a man be indited or appealed for high treason, and breake the prison, this breaking of prison is not high treason, till it be so declared by parliament because such offence is not mentioned in the act of 25 E. 3. and therefore according to the act of 25 E. 3. it is so declared by the act of 2 H. 6. And yet the resolution of the judges in 1 H. 6. is good law: for there the case is, that a man outlawed of felony was in prison in the kings bench, in which prison he knew that certaine persons were there committed for high treason, and brake prison, and carried and led out the prisoners that were there in gaole for treason; and seeing there be no accessaries in high treason, this was an abetting and aiding of them for their escape, he knowing them to be imprisoned for high treason; and thereof he was indited, and arraigned,

1 H. 6. 5. 9. E. 4.

26. See W. 2.

ca. 34. Rot. parl.

an. 2 H. 6. nu.

60. Vid. 14. El.

ca. 2.

Rot. parl. 2 H. 6.

nu. 18. Sir John

Mortimers case

declared in par-

liament to be

treason.

2 H. 6. ca. ult.

in print.

Stanf. pl. coron.

32. f.

arraigned, and pleaded not guilty, and was found guilty. And it was adjudged by all the iudices, that hee was a traitor, and was drawne and hanged, which are the words of the booke. And the principall end of this case was to prove, that a man attainted of felony might be indited, arraigned, tried, and adjudged for high treason, for the benefit of the king, and the odiousness of the offence, and the scope and end of the case is ever to be observed; for in that case it must be also intended, that the treason was committed before the felony. And it is to be remembered, that the statute of 1. Mar. doth not onely repeale all treasons, but all declarations of treason made by any act of parliament, since the said act of 25 E. 3. A man imprisoned for petit larceny, or for killing of a man, *se defendendo*, or by misfortune, and breake prison, it is no felony, because he shall not for the first offence *subire iudicium vite vel membri. Et sic de similibus.*

Vid. Stanf. pi.
coron. 107. b.

1. Mar. the first
statute.

(3) *Nisi causa, &c.*] This act speaking of a cause, is to be intended of a lawfull cause; and therefore false imprisonment is not within this act,

Imprisonment is a restraint of a mans liberty under the custody of another, by lawfull warrant in deed or in law. Lawfull warrant is, when the offence appeareth by matter of record, or when it doth not appeare by matter of record. By matter of record, as when the party is taken upon an inditement at the suit of the king, or upon an appeale at the suit of the party. When it doth not appeare by matter of record, as when a felony is done, and the offender by a lawfull *mittimus* is committed to the gaole for the same. But between these two cases there is a great diversity: for in the first case, whether any felony were committed, or no, if the offender be taken by force of a *capias*, the warrant is lawfull; and if hee break prison it is felony, albeit no felony were committed. But in the other case, if no felony be done at all, and yet he is committed to prison for a supposed felony, and breake prison, this is no felony, for there is no cause; and the words of this act are, *nisi causa, pro qua captus fuerit, tale iudicium requirit.* So as the cause must be just, and not feigned; for things feigned require no judgement.

See Mag. Chart.
cap. 29.

[591]

If A. give B. a mortall wound, for which A. is committed to prison, and breaketh prison, B. dyeth of the wound within the yeare, this death hath relation to the stroke; but because relations are but fictions in law, and fictions are not here intended, this escape is no felony, 11 H. 4. 11. Plowd. com. 401. Coles case.

Seeing the weight of this business touching this point, to make the escape either in the party, or in the gaoler felony, dependeth upon the lawfulness of the *mittimus*, it shall be necessary to say somewhat hereof: first, it must be in writing in the name, and under the seale of him that makes the same, expressing his office, place, and authority, by force whereof he maketh the *mittimus* and is to be directed to the gaoler, or keeper of the gaole or prison. 2. It must containe the cause (as it expressly appeareth by this act, *nisi causa pro qua captus, &c.*) but not so certainly, as an inditement ought, and yet with such convenient certainty, as it may appeare judicially, that the offence *tale iudicium requirit* as *pro alta prodicione, viz. in personam domini regis, or pro contrafactura magni sigilli domini regis, &c. or pro contrafactura monete domini regis, or pro parva prodicione, viz. pro morte (talis) magistri sui, or pro feloniam, viz. pro morte talis.*

25 E. 3. 42. b.
coron. 134.
32 E. 3. coron.
240. 9 E. 4. 52.

Ec. or *pro burglary*, or *robberia*, *Ec.* or *pro felony*, *viz.* for stealing of a horse, &c. or the like, so as it may in such a generality appeare judicially, that the offence *tailè judicium requirit*. And this is proved both by reason and authority. By reason, first, for that it is in case of felony, *quæ inducit ultimum supplicium*; and therefore ought to have convenient certainty, as is aforesaid. 2. Also it must have convenient certainty, for that a voluntary escape is felony in the gaoler. 3. If the *mittimus* should be good generally *pro felony*, then as the old rule is, *ignorantia judicis foret calamitas innocentis*; for the truth of the case may be, that he did steale charters of land, or wood growing, or the like, which in law are no felonies; and therefore in reason in a case of so high nature concerning the life of man, the convenient certainty ought to be shewed.

By authority. The constant forme of the inditement in that case for escape either by the party, or voluntarily suffered by the gaoler is, that he was arrested *pro suspitione cujusdam felonice, viz. pro morte cujusdam M.N. felonice interfecti*, or the like; for the inditement must rehearse the effect of the *mittimus*, which directly proveth, that the cause in such a generall certainty ought to be shewed: *Vid.* 25 E. 3. fol. 42.

Also if a man be indited of treason, or indited or appealed for felony, the *capias* thereupon, whereby the party is to be arrested, comprehendeth the cause. *A fortiori* the *mittimus*, whereby the party is to be arrested, having no such ground of record as the *capias* hath, must, pursuing the effect of the *capias*, comprehend the cause in convenient certainty. 25 E. 3. fol. 42. pl. 32. there ought to be a certaine cause: and in the same lease, pl. 35. in case of breaking of prison, the cause of the imprisonment ought to be shewed.

25 E. 3. fo. 42.

9 E. 4. 26. 41 aff.
5. 22 E. 3. coron.
242, 243. 248.
43 E. 3. ib. 424.
3 E. 3. ibid. 312.
323. 333. 345.
346. 2 E. 3. f. 1.
26 aff. 51. 22 E.
3. 13. 27 aff. 42.
27 aff. p. 116.
15 E. 2. coro. 38.
9 H. 4. 1. 10 H.
4. 7. 11 H. 4. 11.
8 E. 2. coro. 422.
430, 431. 27 H.
6. 7. 39 H. 6. 33.
1 R. 3. ca. 3.
2 H. 5. ca. 7.
21 H. 7. 17.

If a man be indited, *quod felonice fregit prisonam*, *Ec.* generally, it is not good; for the inditement ought to rehearse the specialty of the matter according to the statute, that he being imprisoned for felony, &c. *fregit prisonam*. We have quoted many other books, which though they be not so certainly reported, as might have been wished, yet the judicious reader may gather fruit of them. But see before the exposition of *Magna Charta*, cap. 29. *verbo*, *Aut per legem terræ*, and observe well the words of the writ of *habeas corpus*, for a direct prooffe that the cause ought to be shewed.

Lastly, see hereafter in the exposition of the statute of *articuli cleri*, the resolution of all the judges of England, the answer to the 21 and 22 objections, which we will in no sort abridge for the excellency thereof, but referre you to the fountaines themselves.

Hereupon it appeareth, that the common warrant or *mittimus* to answer to such things as shall be objected against him, is utterly against law.

Now as the *mittimus* must containe the cause, so the conclusion must be according to law, *viz.* the prisoner safely to keep, untill he be delivered by due order of law, and not untill he that made it shall give other order, or the like.

And if the warrant be not lawfull, if the gaoler suffer such a prisoner to escape voluntarily, it is no felony in him. But admit the warrant be lawfull, and in particular for felony, and the gaoler suffer him willingly to escape, untill the prisoner be attainted, the gaoler shall not answer to the escape, though the prisoner be indited; for the

the felony of the prisoner shall not be tryed between the King and the gaoler, because the prisoner is a stranger thereunto. But if the warrant be lawfull, and there is a felony done, and one is lawfully committed for the same, if he breake prison he may be indited for that escape before he be attained of the offence, because he is party. And albeit the gaoler be *de facto, et non de jure*, yet shall he be charged for the escape.

39 H. 6. 33.

And certainly this law of *nisi causa, &c.* agreeth with that judiciall saying of Felix in the holy history, *sine ratione mihi videtur mittere vinculum, et causas ejus non significare.* And whatsoever Felix was, yet according to that old rule, *Veritas à quocunque dicitur à Deo est.*

Act. Apost. c. 25.
ver. 27.

(4) *Tale judicium requirit.*] If a man be committed by lawfull warrant for suspicion of felony done, if he breake prison, he may be indited for that escape, albeit the commitment be for suspicion of felony, and yet no judgement can be given against him for suspicion, but for the felony it selfe, whereof he is suspected; and so be many presidents.

43 E. 3. cor. 454
44 ass. 12.
Rot. Parl. 2 H. 6.
nu. 18. Sir John
Mortimers case.
1 H. 6. 5.
1 Mar. Dyer 99.

And albeit the words be in the present time, yet if a felony be made after by parliament, it is within the provision of this statute.

For other matters concerning escapes, you may reade the learned treatise of justice Stanford, pl. coron. fol. 30, 31. &c. which need not here to be inserted.

STATUTUM DE MILITIBUS;

[593]

Editum Anno primo Edw. II.

THIS writ king Edward the second granted in the time of the parliament, and caused it to be entred of record; and therefore is here stiled by the name of a statute or ordinance, and the very frame of the writ doth prove it to be no act of parliament: but let us take the ford as we find it, and peruse the words thereof.

Cap. i. **DOMINUS** rex concessit;
*quod omnes illi qui milites
esse debent, et non sunt (1), et districti
fuerint ad arma militaria suscipienda
infra festum natalis Domini, habeant
responsum ad prædicta arma militaria
suscipienda usque in octab' sancti Hi-
larii sine actione: et extunc distrin-
gantur, nisi interveniant.*

2. Item

OUR soveraigne lord the king hath graunted that all such as ought to be knightes, and bee not, and have beene distrained to take upon them the order of a knight within the feast of the nativitie of our Lord, shall have respite to take the foresaid harnes of a knight, untill the utas of Saint Hillarie without occasion, and after
that

3 P 2

2. *Item concessit quod si aliquis questus fuerit in cancellaria, quod districtus fuerit, &c. et non habeat xx. li. terræ in feodo, vel ad terminum vitæ suæ, et hoc velit verificare per patriam, tunc discretis et legalibus militibus de comit' ad prædictam inquisitionem capiendam scribatur. Et si per illam inquisitionem ita fuisse constiterit, fiat ei remedium, et cesset districtio.*

3. *Item si aliquis implacitatus fuerit de tota terra sua, vel etiam de parte ejusdem, ita quod residuum non sufficiat ad valentiam xx. li. et hoc possit verificare, tunc cesset districtio, donec placitum illud terminetur.*

4. *Item si quis eorum teneatur in certis debitis atterminatis ad scaccarium, ad certam summam inde percipiendam per annum, et residuum terrarum suarum ultra prædictam summam valorem xx. li. annuarum non attingat, cesset districtio donec prædictum debitum fuerit solutum.*

5. *Et nullus distringatur ad arma militaria suscipienda antequam venerit ad ætatem 21 annorum.*

6. *Item nullus ratione terræ suæ, quam tenet in maneriis, quæ nunc sunt de antiquo dominico coron', et tanquam sokemannus, et quæ terra dabit tallagium, quando dominica regis talliantur, distringatur ad arma militaria suscipienda.*

7. *Item de illis qui terras suas teneant in socagio de aliis maneriis quam de maneriis coronæ, et nullum faciunt servitium*

that they shall bee distrained except they make some other meane.

Also hee hath graunted that if any will complaine in the chauncerie, because hee was distrained, &c. and hath not xx.li. yeerely in fee, or for terme of life, and will prove that by the countrey, then it shall bee written unto the more discreette and sage knights of the shire, to take the sayd inquisition, and if it fortune to bee tryed so by the same inquest, hee shall have remedie and the distresse shall cease.

Also if any bee impleaded for all his land or for part of the same, so that the residue bee not sufficient to the value of xx.li. and can prove the same, then the distresse shall cease untill the same plea be determined.

Also if any of them bee bounden in certaine debtes awarded in the eschequer for a certaine summe to be received yeerely out of his lands, so that the residue thereof doth not amount to the yeerely value of xx. li. besides the same summe: the distresse shall cease untill the foresaid debte be cleerely paide.

And none shall be distrained to take upon him the order of a knight before that he come unto the age of xxi. yerres.

Also none by reason of any land that he holdeth in manors which be now in auncient demeane of the crowne as a sockeman, and which lands must also give tallage when the kings demeanes are tayed, shall be distrained to take upon him the order of a knight.

Also of them that hold their lands in socage of other manors then of the manors of the king, doing no forreine service, the rolles of the chauncerie shall

vitium forinsecum, scrutentur rotuli de cancellaria de tempore predecessorum domini regis, et fiat secundum quod fieri consuevit.

shall be searched for the time of the kings predecessors. And it shall bee done as it hath used to be done.

8. *Eodem modo fiat de clericis infra sacros existentibus laicum seodum tenentibus, qui milites esse deberent, si laici fuissent.*

In like mannor shall be done of clerkes being within orders, holding lay fee which should be knights if they were laye.

9. *Item nullus distringatur pro burgagiis suis, licet valorem xx. li. attingant, aut plus.*

Also none shall be distrained for his burgage lands, although they doe amount to the value of xx.li. yeerely or more.

10. *Item qui milites esse debent et non sunt, qui per modicum tempus terras suas tenuerunt, et similiter qui nimiam senectutem, vel defectum membrorum habent, seu morbum incurabilem, vel onus liberorum, vel placitorum allegant, vel alias causas necessarias prætendunt: adeant ad Robertum Typtost, et Anto^o de Berk, et coram eis fines faciant: quibus est injunctum, quod secundum discretionem eorum, rationabiles fines admittant de viris prædictis.*

Also they that ought to be knights and be not, which have holden their lands in their hands but a small time, and likewise such as should be knights that do pretend great age, or default of their members, or any other incurable disease, or charge of their children, or of suites, or do alledge such necessary excuses, they shall resort unto Robert Typtoffe and Anthonie de Berke, and shall make fine before them, to whom it is enjoyned that according to their discretions they shall admitte the reasonable fines of all such persons. [*Rastell's Translation.*]

(1) *Dominus rex concessit, quod omnes illi qui milites esse debent, et non sunt.*] That is, the king doth grant, that all they which ought to be knights, and be not, &c. In these words consist the locke and the key of this writ, *viz.* who by the common lawes of this realme ought (that is, *de jure*) to be compelled to be a knight. For the understanding whereof, and of all the parts of this writ, seven things fall into consideration. (There being foure kinds of knights, *viz.* knights of the garter, knights banaret, knights of the bath, and knights bachelor of the spurre, 3 E. 4. cap. 5.)

First, of what degree knighthood is. This writ being understood of a knight bachelor.

It is resolved in our bookes without any contradiction, that the name of this knight is a name of dignity, and of the inferiour degree of nobility; and therefore is parcell of his name. And in writs and inditements he ought to be named knight by the common law; but so it is not of the state of an esquire or gentleman. * Britton fitleth a knight honourable, and in the record of 9 E. 1. Sir John Aston knight hath the addition of *nobilis*; and certaine it is, that, seeing it is a name of dignity, it followeth, that he ought to have sufficient revenue to maintaine that dignity. See W. 1. cap.

11 E. 3. brev.
259. 26 E. 3.
brev. 250.
42 E. 3. 9.
22 R. 2. brev.
925. 4 H. 4. 2.
7 H. 4. 7. 11 H.
4. 19. 14 H. 4.
21. 7 H. 6. 15.
14 H. 6. 15.
22 H. 6. 32 H.
6. 29. 35 H. 6.

55. 5 E. 4. 19. 15 E. 4. 14. 18 E. 4. 20. 21 E. 4. 71. * Brit. cap. 25. fo. 49. b. Mich. 9 E. 1. in banco rot. 63. Somerset.

10. *verbo chivalers*, that in ancient times coroners ought to have been knights, and the reason was, for that being knights, the law did intend, that they had sufficient to answer both the king and the subject, if cause should require. But hereof more shall be said hereafter.

In the meane time this is to be observed, that the greater dignity doth never drowne the lesser dignity, but both stand together in one person: and therefore if a knight be created a baron, yet he remaineth a knight still; and if the baron be created an earle, yet the dignity of a baron remaineth, *et sic de cæteris*. But if an esquire (which is no name of dignity be made a knight, the degree of the esquire is changed, and gone, and cannot so be named in any judicall proceeding.

Secondly, of what quality he that is to be a knight ought to be, *debet*, &c. We have not found that a baron, being a lord of parliament; or higher degree, hath been distrained *ad arma militis suscipienda*. But he that is distrained, &c. ought to be a gentleman of name and blond, *claræ loco natus*, or else *non debet*, he ought not to be compelled by this writ to take the dignitie of knighthood upon him.

Of ancient time those that held by knights service were regularly gentile, and those which held by socage, or in burgage, were yeomen or burgeses: and this appeareth by the ancient rule of law, * *Lex Angliæ nullum scutagium aut servitium militare de sockmannis aut burgenfibus expetit*. It appeareth also by many ancient records, and particularly by this writ, that *sockmannus, &c. et qui terras tenent in socagio, &c. et nullum faciunt forinsecum servitium*, that is, those which hold in socage, of what value soever, and doe no knights service, ought not to be knights, *non debent, &c.* And our writ saith, *Nullus distringatur pro burgagiis suis, &c.* no man ought to be distrained to be a knight for the land which he holds in burgage, &c. of what value soever. But though it were of ancient time a badge of gentry to hold by knights service, yet now *tempora mutantur*, and many a yeoman, burgesse, or tradesman purchase lands holden by knights service, and yet (*non debet*) ought not for want of gentry be a knight. At this day the surest rule is, *Nobiles sunt qui arma gentilicia antecesserum suorum proferre possunt*; therefore they are called *scutiferi, armigeri, &c.* When a knight is degraded, one of his punishments is, *quod clypeus suus gentilicius reversus erit*, and here his armes be reversed that beareth none.

Lands and tenements anciently holden by knights service, belonging to the nobility and gentry of the realme, are not of the custome of gavelkind, which belonged to the yeomanry, and were holden in socage for the service of the plow: and this appeareth by the judgement of the whole parliament in 31 H. 8. cap. 3. and by the booke of 9 H. 3. tit. Prescription 63. and 26 H. 8. fol. 4. and the reason thereof was, because the lands and tenements holden by knights service should not be carried by descent into many hands of issues males, whereby the service for defence of the realme in a few descents should be lost or diminished, and the owners (the lands being divided into so many hands) should not be able to maintaine the countenance of their order and degree. *Inter statuta seu institutiones H. 1. cap. 11. Militibus qui per loricas terras suas deserviunt, terras dominicarum carucarum suarum quietas ab omnibus gildis, et ab omni opere ipso dono meo concedo; ut sicut benignitas mea propensor est in eis, ita*

7 E. 4. 7. ad-
judge. 32 H. 6.
29.

2.

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Vid. 7 E. 3.
ca. 19. Un
gentlehome de
estat. Pat. 38
E. 3. part. 1. m.
10. Rex licen-
tiam dedit Johan-
ni Beverly armi-
gero suo, &c.
Rot. clauf.
19 R. 2. in dorf.
proclam. Ne quis
miles, armiger,
&c. 11 H. rot.
clauf. m. 2.
Omnes qui te-
nent per servi-
tium militare in
capit milites
fiant.
* See here cap.
6 & 7 Glanv.
lib. 7. cap. 9.
Burgenfis.

Mich. 9 E. 2.
fol. 61. in libro
reco. Dower de
socage terre, &
nemy de terre
tenus per service
de chivaler, Lit.
de la pluis beale.
* 31 H. 8. cap. 3.
9 H. 3. pre-
script. 63. 26 H.
8. 4. b. Bract.
fol. 77.
Glanv. l. fol. 46
In Bundello.
et chæ. an 1 E.
3. acc.

ita mihi fideles sint: et sicut tam magno gravamine alleviati sunt, ita equis et armis se bene instruant, ut apti et parati sint ad servitium meum, et ad defensionem regni mei. And where it is enacted by the statute of prerogative regis, cap. 16. *quod feminae non participabunt cum masculis*, it is to be understood of such as be in equall degree; as the sister shall not inherit with the brother, because they be in equall degree; but the daughter of the sonne shall have a part with her uncle, for they be not in equall degree.

A knight is by creation, and not by descent, a gentleman is by descent, and yet I read of the creation of a ^bgentleman; and thus it was: a knight of France came into England, and challenged John Kingston (a good and a strong man at armes, but no gentleman) as the record saith, *ad certa armorum puncta, &c. perficienda. Rex, ut praedictus Johannes honorabilis in praemissis accipiatur, ipsum Johannem ad ordinem generosorum adoptavit, et armigerum constituit, et certa honoris insignia ei concessit, &c.* Note, the king made him no knight, as his adversary was, because he was no gentleman.

But for any thing that I have read and doe remember in the raigne of H. 4. or ever before, gentlemen of name and blood had very rarely the addition of *generosus* or *armiger*, as of a state or degree, but were distinguished from yeomen, who serve by the plow, by their service, *viz.* knights service, *forinsecum servitium*; but in the raigne of H. 5. and ever since, they have had the addition of gentlemen or esquires, and the reason thereof is this: it is enacted by the statute of 1 H. 5. that in every writ originall of actions personals, appeales, and inditements, in which processe of outlary doe lye, that to the name of the defendants addition be made of the estate or degree, or myserie: and hereupon in those writs addition was made as the case required, of *generosus* or *armiger*; for if a gentleman were named in such a writ husbandman, or yeoman, he may abate the writ, by pleading that he is a gentleman. And after this the like additions were made in commissions, and after that in grants and conveyances, &c.

And great discord and discontentment would arise within the realme, if yeomen and tradesmen should be called to the dignity of knighthood, to take the place and precedency of the ancient and noble gentry of the realme. And the eldest sonne of a knight is an esquire, as his father ought to be, before he was called to the dignity of knighthood.

Thirdly, of what livelihood or revenue a knight ought to be, *debet, &c.* And it is certaine, that he ought to have a knights fee: *i. feudum unius militis*. Herein three things are to observed: first, whether the law doth determine of what yearly value a knights fee (*viz.* the lands and revenue of a knight) ought to be. Secondly, if the law define not the certainty of the value, what is esteemed in law a knights fee. Thirdly, what estate he ought to have in it.

To the first, the law doth respect rather the value, then the content, *viz.* to be of sufficient value to maintain the degree of a knight, but doth not determine of any certaine yearly value: for nothing is more incertaine than the values of lands in succession. And therefore in a writ in the raigne of H. 3. no value was expressed, but a writ issued out of the chancery generally to distraine *omnes qui tenent per servitium militare*.

At the making of *Magna Charta* a knights fee was accounted the value of 20 li. and the fourth part thereof was a knights reliefe.

Prerog. regis, cap. 16.
Vid. Pasch.
4 E. 1. in com banco rot. 22.
Kanc' for the custome of gavelkind, Hill.
10 E. 1. in banco Kanc' per de Benbr. kes case, & m. 18 E. 1. in banco rot. 68.
Suff. Laurence le Fries case.
b Rot. patent. an. 13 R. 2. part. 1. 7 H. 4. fol. 7. 1 H. 5. cap. 1.

1 H. 5. cap. 5.
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14 H. 6. 15.
22 H. 6. 3.
28 H. 6. 8.
38 H. 6. 10.
23 H. 6. cap. 15.

3.

Lib. 9. fol. 124.
Lowes case.
1. part Institutes, sect. 112.
Sir Tho. Smith, lib. 1. cap. 18.
11 H. 3. ubi sup.

9 H. 3. Magna Chart. cap. 2.

Glanv. lib. 9.
ca. 4 l. b. 7. fol.
33. b. Rot. parl.
20 E. 1. l. 4.
* Trin. 1 E. 2.
coram rege, rot.
4. Linc.
a Rot. clauf.
19 E. 2. m. 16.
in dorf.
b Brev. regis,
part 1 & 2.
2 R. 2.
c Rot. parl.
* Hill. 40 H. 3.
pag. 254. a. 30.
ibid. a. 60.

In anno 20 E. 1. the value of the knights fee in the writ was 40 li. by our writ in 1 E. 2. 20. li. * Trin. 1 E. 2. 48. *carucat' terrar. faciunt unum feodum militis*. This was in the same year that this writ was granted. a 19 E. 2. *feodum unius militis annui valoris* 40 li. b 2 R. 2. 10. li. *per annum*. 7 H. 6. fol. 15. 10 li. *per annum*. c 18 Hen. 6. m. 43. 40 li. *per an. &c.* So as (as hath been said) nothing is more incertaine then the values of lands; but he must have *feodum unius militis*. And in severall ages a knights fee, as before it appeareth, was valued at severall values. * The king caused a proclamation to be set forth, that all such as might dispend 15 li. in lands, should receive the order of knighthood, and those that would not, or could not, should pay their fines.

There was 5 markes set on every shrieves head, because they had not distrained every person that might dispend 15 li. lands, to receive the order of knighthood, as was to the same shrieves commanded.

d Vid Camden.
Brit. pag. 126.
Note, a baron &
others of higher
degrees are pre-
sumed to have
greater livings,
as appeareth by
their reliefe,
Mag. Chart. cap.
2. li. 2. fol.
124. ubi supr.
Glanv. lib. 2.
ca. 3. acc.
Pasch' 3 E. 1.
coram Rogero de
Seton & sociis
suis, rot. 10.
Ralph Norman-
ville case.
19 E. 2. ubi
supr.
e See here, cap.
3.

d As to the second it appeareth before, that he ought to have a knights fee: then the onely question is, what quantity of land a knights fee is. And without doubt this shall not be accounted by the acres; for some acre is of far greater value then another: and therefore that should be as uncertaine as the values be; but this is resolved by prudent sages of the law of ancient time, who have reduced a knights fee to a certaine number of carues, or plow lands, which though they be incertaine (for if the land be fertile and heavie, there goeth to a plow land the lesse; and if it be lighter, a greater quantity) yet it is as neere to certainty as can be, and this computation time cannot alter: and therefore a knights fee containeth e 12 plow lands. And by this writ it appeareth, that a knights fee is here valued at 20 li. *per an.* And if he be impleaded for it, or any part thereof, &c. that he shall not be compelled to be a knight, untill the action be determined. And so likewise, if he be indebted to the king, and his debt stalled, he shall not be compelled to be a knight, untill his debt be paid; and the reason hereof is, that povertie should not be apparelled with honour and dignity.

As to the third, he ought to have an estate in fee-simple or fee-taile, as it appeareth in 20 E. 1. *ubi supra, in feodo et hereditate*. Or as tenant by the curtesie (which in this writ is intended by the name of tenant for life) whose heire by possibility may inherit.

Fourthly, to what end he ought to be called to this dignity of knighthood. And our writ doth truly answer, *ad arma militaria suscipienda*, to take upon him the military armes, or the armes of a knight for the honour, and service, and defence of the realme; this is *pro bono publico*.

The writs of parliament are to returne two knights for every county *gladiis cinctos*, not that they should come to the parliament girt with swords, but that they should be able to do knights service, *et arma militaria exercere*, the sword being named, for that it is the warden of all weapons: and therefore this end ought not to be pretended, and a private intended. *Dicuntur arma, quia armos tegunt, et ab humeris dependent, et continent scutum, gladium, tela, et ea quibus præliantur*. No insufficient men are to be called *ad arma militaria suscipienda, ne dignitas hujus ordinis vilesceret*.

Fifthly,

Fifthly, of what age he ought to be, &c. when he is called, *debet*, &c. By this writ it appeareth, that he ought to be above 21, and this agreeth with Littleton, and other authorities and records; but this is so to be understood, that he cannot be compelled to be a knight before 21, but if he be made a knight before that age, it is good enough.

* And above the age of 60 (which in this writ is called *nimia senectus*) no man ought to be compelled *ad arma militaria suscipienda*, or to serve as a souldier. If the plaintife in an appeale of death, &c. be of the age of 60, or maimed, or of any great infirmity, so as hee is not able to fight, hee shall not be compelled to wage battell. And by this writ it appeareth, that if hee hath *defectum membrorum, seu morbum incurabilem, vel alias causas rationabiles*, that hee shall not be compelled *ad arma militaria suscipienda*, because he is not able to performe the service and duty of knighthood.

Sixthly, by what meanes hee ought to be called, *debet*, &c. hee ought to be called by writ. It hereby appeareth, that this writ issueth out of the chancery to the shrieve, commanding him, *quod proclamari faciat, quod omnes illi qui habent * terram, arma militaria suscipiant citra (tale festum) et quod summoneri fac eos*, &c. and this writ is returnable into the chancery at a certaine returne. At which day of the returne it is necessary for them that are summoned to appeare; for if they make default, it is finable (which, it may be, is the marke that is aimed at) but if they appeare, and take the dignity upon them, or refuse for the causes aforesaid, or any of them, they ought not be fined.

This writ and the returne thereof is by writ of *mittimus* transmitted into the court of exchequer, who cannot make a commission to others concerning this matter, but ought to proceed legally themselves, because they have but *delegatam potestatem, quae non potest delegari*, and they are learned and sworne judges, and able to allow the parties their just exceptions.

For writs of summons or *distingas* for the dignity of bachelor knighthood, see Rot. claus. 29 H. 3. m. 9. 44 H. 3. parte prima. *ibid.* 6 E. 1. dorf. 8. *ibid.* 6 E. 2. dorf. 29. &c.

Seventhly, if he ought to be a knight, and refuse, or make default, how often he may be fined.

He can by the law be fined but once, no more then an apprentice at law, that is called by writ *ad statum et gradum servientis ad legem*, if hee refuse, and be fined, he cannot be fined againe; for so he might be fined infinitely, *et infinitum in jure reprobatur*.

The commons petitioned (to have a declaratory law) that no person once making fine for not being knight, be never after called thereunto againe. But this was but to avoid charge and vexation. *Vid.* Dyer, 35 H. 8. 55. Brook briefe 150, *fine per contemptis* 19.

We doe not remember that we have read any thing touching this matter in Bracton, Britton, Fleta, Mirror, the Register, or F.N.B.

No clerke within holy orders, be hee regular or secular, though hee hath a knights fee, can be made a knight, as by this writ it appeareth.

See Matth. Paris, *an.* 29 H. 3. pag. 882. *Rex die natali Jobanem de Gatefden clericum, et multis ditatum beneficiis, sed omnibus ante expectatum resignatis, quia sic oportuit, balibeo cinxit militari.* This last

5.

* See here, ca. 10. Rot. claus. an. 7 E. 3. part. 1. mem. 25. & m. 22, 23. Rot. parl. 5 H. 4. nu. 24, 25. 33 H. 8. cap. 22 E. 4. 19. 15 E. 2. coron. 185. Brit. fol. 40. Fitz. N.B. 163. n. f. mile. See here, cap. 10. 6.

7 H. 6. 15. See here, cap. 2. * The yearly value of the land.

7.

Rot. Parl. 18 H. 6. nu. 43. 14 H. 6. 2, 3. Fitz. N.B. 231. b. Le Roy navera que un pension.

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See here, cap. 7.

See here, cap. 10.

last clause, *item qui milites esse debent, et non sunt*, and yet have just cause of excuse (as for instance, that they are impleaded for their land, which before by this writ is allowed for a good excuse, &c. or have any other of the just causes of excuse here expressed, and yet will not stand to a legall and chargeable pleading and proceeding) they may, if they will, redeem their vexation and charge, and submit themselves to a reasonable fine: and therefore by this writ Robert Tiptoft, and Anthony de Berke are appointed to asseſſe reasonable fines; but this must be understood by consent, for this was no legall proceeding. I find in the parliament roll *de anno* 18 E. 1. rot. 6. that Robert Tiptoft was *justiciarius domini regis*. And so, it is like, Anthony Berk was; but certainly what he was, we have not yet found.

For knights of
the bath.

Writs to divers *ad ordinem militiæ de balneo suscipiendum juxta antiquam consuetudinem in creatione usitatam*, Rot. claus. in dorso, 10 H. 7. 20. Septembris.

For knights ba-
nereys.

See Rot. Vasc'h' 13 E. 3. m. 13. William de la Pole created. Rot. eodem m. 1. Rich. de Cobham created. Rot. Pat. 15 E. 3. part 2. m. 22. John Coupland created. See Matth. Paris, pag. 1354, 1355. &c. Camden Brit. 124.

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ARTICULI CLERI,

Edit' Anno nono Edw. II.

LONG before the making of this statute, that is, *anno* 42 H. 3. *anno Domini* 1258, Boniface younger sonne of Thomas earle of Savoy, archbishop of Canterbury, uncle of Elianor queen of England, who was daughter of Reymond earle of Province by Beatrix daughter of Thomas earle of Savoy, and sister to the said Boniface, made divers and many canons and constitutions provinciall directly against the lawes of the realme, which canons begun thus: *Universis Christi fidelibus ad quos præsens pagina pervenerit, Bonifacius miseratione divina Cantuariensis archiepiscopus, totius Angliæ primas, et sui suffraganei in verbo salutari salutem*, And ending thus: *Actum apud Westm', sexto iduum Junii anno Domini 1258. In quorum omnium robur et testimonium, &c.* which being exceeding long, we could not here insert. But the effect of them is, so to usurp and ineroach upon many matters, which apparently belonged to the common law, as, amongst many others, the tryall of limits and bounds of parishes, and right of patronage, against tryall of right of tithes (by *indicavit*) against writs to the bishop upon a recovery in a *quare impedit*, &c. in the kings courts. That none of their possessions or liberties, which any of the clergy had in the right of their church, should be tried before any secular judge; (so as they would not have consufance of things spirituall, but of temporall also) and concerning distresses and attachments within their fees, and

and in effect, that no *quo warranto* should be brought against them, when they had been long in possession, with an invective against the perverse interpretation by the judges of the realm (so they termed it) of charters, &c. granted to them, and in substance against the ancient and just writs of prohibition in cases, where by the lawes of the realm they are maintainable: and commandement given to admonish the king, and interdict his lands and revenues, and thundred out excommunications against the judges and others if they violated, or obeyed not the said canons and constitutions. And this was the principall ground of the controversies between the judges of the realm and the bishops: for this caused ecclesiasticall judges to usurp and incroach upon the common law. But notwithstanding the greatnesse of the archbishop Boniface, and that divers of the judges of the realm were of the clergy, and all the great officers of the realm, as chancellor, treasurer, privie seale, &c. were prelates; yet the judges proceeded according to the lawes of the realm, and still kept, though with great difficulty, the ecclesiasticall courts within their just and proper limits. The courts by pretext of these canons being at variance, at length at a parliament holden in the 51 yeare of Henry the third, Boniface, and the rest of the clergy complained (which was *ultimum refugium*, and yet the right way) and exhibited many articles as grievances, called *Articuli Cleri*. The articles exhibited by the clergie either by accident or industry are not to be found; some of the answers are extant, viz. *ad 16 articulum de usuris respondetur, quod licet episcopus, &c. ad 17 articulum de defamatione, &c. respondetur, si aliquis defamatus, &c. si autem certæ personæ nominatæ fuerint, per quas rei veritas melius scire poterit, nominantur, ad proband' matrimonium vel testamentum: et similiter in accusationibus tales personæ impediendæ non sunt, quia testimonium perhibent veritati, sed propter hoc non est congregatio laicorum faciend'*, quia per congregationem hujusmodi servitia dominus possit deperire.

Ex fragmento
Rot. parl. anno
51 H. 3.

Ad 18 artic' dominus posuit remedium.

Ad 19 artic' respondetur, quod archiepiscopus de episcopatu vacante non se intronittat quantum ad temporalia, sed tantum se de spiritualibus intronittat, &c.

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Ad 20 artic' respondetur, quod de clericis occisis, et de hiis qui forsan occidi contigerit, in futurum fiat justitia, secundum legem et consuetudinem terræ, &c.

Ad 21 artic' respondetur, quod excommunicatus per ordinarium, aut alium judicem competentem, et denunciatus taliter, debet ab aliis evitari, nisi forsan excommunicatus conqueratur se esse injuste excommunicatum pro aliqua re temporalis, de qua non debeat coram ordinario respondere, ad cujus probationem debet admitti, sed in cæteris quæ proponit, ut actor, est interim evitandus.

Ad 22 artic' mandabitur justiciariis, quod non fiant aliquæ prisæ per totam terram de bonis aliquorum, nisi debitæ prisæ et consuetæ.

Ad 23 artic' respondetur, quod cum aliqui teneant aliquod de rege in capite unde custodia debeatur, custodiæ omnium terrarum de quibuscunque tenentes illi tenementa illa teneant cum acciderint (si inde custodia habere debeatur) hactenus ex consuetudine approbata spectarunt ad regem, sed episcopi si expedire videant, inhibeant tenentibus suis, ne aliqua tenementa sibi perquirant de feodis regis.

These

These answers are yet extant of record, and are worthy to be read at large as they yet remain; whereunto we referre the reader. This is to be observed, that none of Boniface's canons against the lawes of the realme, and the crowne and dignity of the king, and the birth-right of the subject, are here confirmed.

Prohibitio formata de statut' Articuli Cleri. Vet. Magn. Chart.

What ther residue of the articles and the answers were, may be collected by that act of parliament entitled *prohibitio formata de statuto articuli cleri*, which was made in the time of Edward the first, about the beginning of his reign, which beginneth thus: *Edwardus, &c. praelatis, &c.* wherein divers points are to be observed against the canons of Boniface: 1. *Quod cognitiones placitorum super feodalibus et libertatibus feodalium, distributionibus, officiis ministrorum, executionibus contra pacem nostram factis, solum negotiationibus, consuetudinibus secularibus, attachmentibus, vi laica malefactoribus reatiis, robberiis, arrestationibus, maneriis, ad vocationibus ecclesiarum, sufficientibus assis juratis, recognitionibus laicum feodum contingentibus, et rebus aliis, et causis pecuniarum, et de aliis catallis et debitis quæ non sunt de testament' vel matrimon' ad coronam et dignitatem regiam pertineant, et de regno de consuetud' ejusdem regni approbata, et hactenus observata.*

2. *Et proceres, et magnates, aut alii de eodem regno temporibus nostrorum predecessorum regum Angliæ, seu nostra auctoritate alicujus non consueverunt contra consuetudinem illam super hujusmodi rebus in causa trahi vel compelli ad comparandum coram quocunque iudice ecclesiastico.*

3. *Et quod vicecomes non permittant, quod aliqui laici in baliva sua conveniunt ad aliquas recognitiones per sacramenta sua faciend', nisi in causis matrimonialibus et testamentariis.* Of the substance of this prohibition, Britton speaketh in these words, *et queux eunt suffert pleader en court christian auters pleas, que de testament ou matrimonie, et de pure spiriuelite sans deniers prender de lay home. Ou suffert lay home iorner devant lordinary.*

Vid. Brit. fo. 35. b. Registr. 36. b. 29 E. 3. 29. F.N.B. 41. a. Vid. Vet. Magn. Chart. fol. 91. Berthelet's impression.

After this the clergy, at a parliament holden in the raigne of the same king E. 1. preferred articles intituled *articuli contra prohibitionem regis*, fearing lest by reason of some generall words therein they might be prohibited in causes, which of right belonged to the ecclesiastical jurisdiction, in these words, *sub hac forma impetrant laici prohibitionem in genere super decimis, oblationibus, obventionibus, mortuariis, redemptionibus penitenciarum, violenta manuum iniectione in clericum vel commissarium, et in causa defamationis, in quibus casibus agitur ad pœnam canonicam imponendam.* And a just and legall answer was made thereunto, as thereby appeareth. But it is to be observed, that they claimed nothing which was against the true meaning of the said act, called *prohibitio formata de statuto articuli cleri*, nor any of Boniface's canons to bee confirmed: and so these matters rested, untill the parliament holden at Lincoln in the ninth yeare of Edw. 2. where Walter Reynolds bishop of Canterbury (whom the king favoured, saith one, singularly for the opinion he had of his fidelity and great wisdom, and *Walterus archiepiscopus Cantuariensis regi gratiosissimus fuit, hæc regis æquissima responsa ad prælatorum petita obtinuit*) in the name of himselfe and of the clergy, preferred these 16 articles, and by authority of parliament had the answers here following *seriatim* to every one of them. And now it may seem high time that we should descend to the perusall of the preamble, and the articles and answers. But before we come to it, it shall conduce

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Mat. Parker, fol. 229.

duce much to the right understanding of divers parts of this act of parliament, to report unto you what articles Richard Bancroft archbishop of Canterbury exhibited in the name of the whole clergy in Michaelmas terme *anno. 3 Jacob. regis* to the lords of the privie counsell against the judges of the realm, intituled, Certain articles of abuses, which are desired to be reformed, in granting of prohibitions, and the answers thereunto, upon mature deliberation and consideration, in Easter terme following, by all the judges of England, and the barons of the exchequer, with one unanimous consent under their hands (resolutions of highest authorities in law) which were delivered to the lords of the counsell. And we for distinction sake, (because we shall have occasion often to cite them) call them *Articuli Cleri. 3. Jacobi.*

His Majesty hath power to reforme abuses in prohibitions.

1.

The clergy well hoped, that they had taken a good course in seeking some redresse at his majesties hands concerning sundry abuses offered to his ecclesiasticall jurisdiction, by the over frequent and undue granting of prohibitions; for both they and we supposed (all jurisdiction, both ecclesiasticall and temporall being annexed to the imperiall crowne of this realme) that his highnesse had been held to have had sufficient authority in himselfe, with the assistance of his counsell, to judge what is amisse in either of his said jurisdictions, and to have reformed the same accordingly; otherwise a wrong course is taken by us, if nothing may bee reformed that is now complained of, but what the temporall judges shall of themselves willingly yeeld unto. This is therefore the first point, which upon occasion lately offered before your lordships by some of the judges, we desire may be cleared, because we are strongly perswaded as touching the validity of his majesties said authority, and doe hope we shall be able to justifie the same, notwithstanding any thing that the judges, or any other can alledge to the contrary.

Objection.

No man maketh any question, but that both the jurisdictions are lawfully and justly in his majesty, and that if any abuses be, they ought to bee reformed: but what the law doth warrant in cases of prohibitions to keep every jurisdiction in his true limits, is not to be said an abuse, nor can be altered but by parliament.

Answer of the judges.

The formes of prohibitions prejudiciall to his majesties authority in causes ecclesiasticall.

2.

Concerning the forme of prohibitions, forasmuch as both the ecclesiasticall and temporall jurisdictions be now united in his majesty, which were heretofore *de facto*, though not *de jure* derived from severall heads, we desire to be satisfied by the judges, whether, as the case now standeth, the former manner of prohibitions heretofore used importing an ecclesiasticall court to be *aliud forum à foro regio*, and the ecclesiasticall law not to be *legem terræ*, and the proceedings in those courts to bee *contra coronam et dignitatem regiam*, may now without offence and derogation to the kings ecclesiasticall prerogative be continued, as though either the said jurisdictions remained now so distinguished and severed as they were before, or that the lawes ecclesiasticall, which wee put in execution, were

Objection.

not

not the kings and the realmes ecclesiasticall lawes, as well as the temporall lawes.

Answer.

It is true, that both the jurisdictions were ever *de jure* in the crowne, though the one sometimes usurped by the see of Rome; but neither in the one time, nor in the other hath ever the forme of prohibitions been altered, nor can bee but by parliament. And it is *contra coronam et dignitatem regiam* for any to usurp to deale in that, which they have not lawfull warrant from the crowne to deale in, or to take from the temporall jurisdiction that which belonged to it. The prohibitions doe not import, that the ecclesiasticall courts are *aliud* then the kings, or not the kings courts, but doe import, that the cause is drawne into *aliud examen* then it ought to be: and therefore it is alwaies said in the prohibitions (be the court temporall or ecclesiasticall, to which it is awarded) if they deale in any case which they have not power to hold plea of, that the cause is drawn *ad aliud examen* then it ought to be; and therefore *contra coronam et dignitatem regiam*.

3.

A fit time to be assigned for the defendant, if he will seek a prohibition.

Objection.

As touching the time when prohibitions are granted, it seemeth strange to us, that they are not onely granted at the suit of the defendant in the ecclesiasticall court after his answer (whereby hee affirmeth the jurisdiction of the said court, and submitteth himselfe unto the same;) but also after all allegations and proofes made on both sides, when the cause is fully instructed and furnished for sentence: yea, after sentence, yea after two or three sentences given, and after execution of the said sentence or sentences, and when the party for his long continued disobedience is laid in prison upon the writ of *excommunicato capiendo*, which courses, forasmuch as they are against the rules of the common law in like cases (as we take it) and doe tend so greatly to the delay of justice, vexation, and charge of the subject, and the disgrace and discredit of his majesties jurisdiction ecclesiasticall, the judges (as we suppose) notwithstanding their great learning in the lawes, will be hardly able in defence of them to satisfie your lordships.

Answer.

Prohibitions by law are to be granted at any time to restraîne a court to intermeddle with, or execute any thing, which by law they ought not to hold plea of, and they are much mistaken that maintaine the contrary. And it is the folly of such as will proceed in the ecclesiasticall court for that, whereof that court hath not jurisdiction; or in that, whereof the kings temporall courts should have the jurisdiction. And so themselves (by their extraordinary dealing) are the cause of such extraordinary charges, and not the law: for their proceedings in such case are *coram non iudice*. And the kings courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court temporall or ecclesiasticall doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgement and execution, as before.

4.

Prohibitions unduly awarded heretofore in all causes almost of ecclesiasticall cognizance.

Objection.

Whereas it will be confessed, that causes concerning testaments, matrimony, benefices, churches, and divine service, with many offences

offences against the 1, 2, 3, 4, 5, 7, 9. and 10. commandements, are by the lawes of this realm of ecclesiasticall cognizance, yet there are few of them, wherein sundry prohibitions have not been granted, and that more ordinarily of latter times, then ever heretofore, not because we that are ecclesiasticall judges doe give greater cause of such granting of them, then before have been given, but for that the humour of the time is growne to be too eager against all ecclesiasticall jurisdiction. For whereas (for examples sake) during the raigne of the late queen of worthy memory, there have been 488 prohibitions, and since his majesties time 82 sent into the court of the arches; we humbly desire your lordships, that the judges may be urged to bring forth one prohibition of ten, nay the twentieth prohibition of all the said 488, and but 2 of the said 82, which upon due considerations with the libels in the ecclesiasticall court, they shall be able to justifie to have been rightly awarded: we suppose they cannot; our predecessors, and we our selves have ever been so carefull not to exceed the compasse and limits of the ecclesiasticall jurisdiction: which if they shall refuse to attempt, or shall not be able to performe, then we referre our selves to your lordships wisdomes, whether we have not just cause to complaine, and crave restraint of this over lavish granting of prohibitions in every cause without respect. That which we have said of the prohibitions in the court of the arches, we verily perswade our selves may be truly affirmed of all the ecclesiasticall courts in England, which doth so much the more aggravate this abuse.

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It had been fit they should have set downe some particular cases, in which they find the ecclesiasticall courts injured by the temporall (as their lordships did order) unto which we would have given a particular answer; but upon these generalities nothing but clamour can be concluded. And where they speake of multitudes of prohibitions; for all granted to, or in respect of any ecclesiasticall court, we have heretofore caused diligent search to be made in the kings bench and common pleas, from the beginning of his majesties raigne, unto the end of Hilary term, in the third yeare of his raigne; in which time we find, that there were granted unto all the ecclesiasticall courts in England out of the kings bench but 251. whereof 149. were *de modo decimandi*, upon unity of possession, for trees of 20 yeares growth and upwards, and for barren and heath ground, and all out of the common pleas, but 62. whereof 31. were such as before, and the rest grounded upon the bounds of parishes, or such other causes as they ought to be granted for; but for that which was done in the late queenes time, it would be too long a search for us to make, to deliver any certainty thereof. And for his majesties time, they requiring to have but two to be lawfully warranted upon the libell in the ecclesiasticall court, we have six to shew to be lawfully warranted upon the libell there, and so are all the rest of like kind, by which it will appeare, that this suggestion is not onely untrue, but also, that the extraordinary charges growing unto poore men, are of necessity by meanes of the undue practices of ecclesiasticall courts.

Answer.

The multiplying of prohibitions in one and the same cause, the libell being not altered.

5.

Although it hath been anciently ordained by a statute, that when a consultation is once duly granted upon a prohibition made

Objection.

to the judge of holy church, the same judge may proceed in the cause, by vertue of that consultation, notwithstanding any other prohibition to him delivered, provided that the matter in the libell of the same cause be not engrossed, enlarged, or otherwise changed; yet notwithstanding prohibitions and consultations in one and the same cause, the libell being no waies altered according to the said statute, are lately so multiplyed, as that in some one cause, as afore-said, two, in some three, in some other six prohibitions, and so many consultations have been awarded, yea divers are so granted out of one court: as for example, when after long suit a consultation is obtained, it is thought a sufficient cause to send out another prohibition in revocation of the said consultation, upon suggestion therein contained, that the said consultation *minus commode emanavit*. By which pretty device the judges of those courts which grant prohibitions, may, notwithstanding the said statute, upon one libell not altered, grant as many prohibitions as they list, commanding the ecclesiasticall judges in his majesties name, not to proceed in any cause that is so divers times by them prohibited, whereby the poore plaintifes doe not know when their consultations (procured with great charge) will hold, and so finding such and so many difficulties, are driven to goe home in great griefe, and to leave the causes in Westminster hall, the ecclesiasticall judges not daring to hold any plea of them. Now may it please your lordships, the premisses being true, we humbly desire to heare what the judges are able to produce for the justifying of these their proceedings.

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Answer.

It were fit they should set downe particular causes, whereupon this grievance is grounded, and then we doubt not but to answer it sufficiently, without using any pretty device, such as is set downe in this article.

6. The multiplyng of prohibitions in divers causes, but of the same nature, after consultations formerly awarded.

Objection.

We suppose, that as well his majesties ecclesiasticall jurisdiction, as also very many of his poore, but dutifull subjects, are greatly prejudiced by the granting of divers severall prohibitions, and consultations in causes of one and the same nature and condition, and upon the selfe same suggestions: for example, in case of beating a clerke, the prohibition being granted upon this suggestion, that all pleas *de vi et armis* belong to the crowne, &c. notwithstanding a consultation doth thereupon ensue, yet the very next day after, if the like suggestion be made upon the beating of another clerke, even in the same court another prohibition is awarded. As also, where 570 prohibitions have been granted since the late queenes time into the court of arches (as before is mentioned) and but 113 consultations afterwards upon so many of them obtained: yet it is evident by the said consultations, that (in effect) all the rest of the said prohibitions ought not to have been awarded, as being grounded upon the same suggestions, whereupon consultations have been formerly granted: and so it followeth, that the causes why consultations were awarded upon the rest of the said prohibitions, were for that either the plaintifes in the court ecclesiasticall were driven for saving of further charge, to compound, to their losse, with their adversaries, or were not able to sue for them; or being able, yet through

through strength of opposition against them, were constrained to desist; which is an argument to us, that the temporall judges doe wittingly and willingly grant prohibitions, whereupon they know, before hand, that consultations are due: and if we mistake any thing in the premisses, we desire your lordships, that the judges, for the justification of their courses, may better enforme us.

It shall be good, the ecclesiasticall judges doe better enforme themselves, and that they put some one or two particular case to prove their suggestions, and thereupon they will find their owne error; for the case may be so, that two severall ministers suing in the ecclesiasticall court for beating of them in one and the selfe same forme, that the one may and ought to have a consultation, and the other not. And so it is in cases of prohibitions, *de modo decimandi*; and hereof groweth the oversight in making this objection. And we assure our selves, that they shall not find 570 prohibitions granted into the arches since her late majesties death; for we find (if our clerkes affirme truly upon their search) that out of the kings bench have been granted to all the ecclesiasticall courts in England but 231 prohibitions (as before is mentioned) from the beginning of his majesties raigne, unto the end of Hilary terme last; and out of the common pleas not 63. And therefore it cannot be true, that so many have passed to the arches in that time, as is set downe in the article; and this article in that point doth exceed that which is set downe in the fourth article by almost 500, and therefore whosoever set this downe, was much forgetfull of that which was before set downe in the fourth article, and might well have forborne to lay so great a scandall upon the judges, as to affirme it to be a witting and willing error in them, as is set downe in this article.

Answer.

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New formes of consultations, not expressing the cause of the granting of them. 7.

Whereas upon the granting of consultations, the judges in times past did therein expresse and acknowledge the causes so remitted to be of ecclesiasticall cognizance, which were presidents and judgments for the better assurance of ecclesiasticall judges, that they might afterward hold plea in such cases, and the like; and were also some barre as well to the temporall judges themselves, as also to many troublesome and contentious persons from either granting or seeking prohibitions in such cases, when so it did appeare unto them upon record, that consultations had been formerly granted in them; they the said temporall judges have now altered that course, and doe onely tell us, that they grant their consultations *certainis de causis ipsos apud Westm' morientibus*, not expressing the same particularly, according to their ancient presidents. By meanes whereof the temporall judges leave themselves at liberty without prejudice, though they deny a consultation; at another time upon the same matter contentious persons are animated, finding no cause expressed, why they may not at another time seeke for a prohibition in the same cause; and the ecclesiasticall judges are left at large to thinke what they list, being no way instructed of the nature of the cause which procured the consultation: the reason of which alteration in such consultations, we humbly intreat your

Objection.

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lordships, that the judges, for our better instruction, may be required to expresse.

Answer.

If we find the declaration upon the surmise, upon which the prohibition is granted, not to warrant the surmise, then we forthwith grant a consultation in that forme which is mentioned, and that matter being mentioned in the consultation would be very long and cumbersome, and give the ecclesiasticall court little information, to direct them in any thing thereafter; and therefore in such cases, for brevity sake, it is usuall: but when the matter is to receive end by demurrer in law, or tryall, the consultation is in another forme. And it is their ignorance in the arches, that will not understand this, and we may not supply their defects with changing our formes of proceedings, wherein if they would take the advice of any learned in the lawes, they might soon receive satisfaction.

8. That consultations may be obtained with lesse charge and difficulty.

Obj:cion.

The great expences and manifold difficulties in obtaining of consultations are become very burthenfome to those that seeke for them; for now a dayes, through the malice of the plaintifes in the temporall courts, and the covetous humours of the clerkes, prohibitions are so extended and enlarged, without any necessity of the matter (some one prohibition containing more words and lines then forty prohibitions in ancient times) as by meanes thereof the party in the ecclesiasticall court, against whom the prohibition is granted, becomes either unwilling, or unable to sue for a consultation, it being now usuall and ordinary, that in the consultations must be recited *in eadem verba* the whole tenour of the prohibition, be it never so long; for the which (to omit divers other fees, which are very great) he must pay for a draught of it in paper viii. d. the sheet, and for the entry of it xii. d. the sheet. Furthermore, the prohibition is quicke and speedy: for it is ordinarily granted out of court by any one of the judges in his chamber, whereas the consultation is very slowly and hardly obtained, not without (oftentimes) costly motions in open court, pleadings, demurrers, and sundry judicall hearings of both parties, and long attendance for the space of two or three, nay, sometimes of eight or nine years before it be obtained. The inconvenience of which proceedings is so intolerable, as we trust, such as are to grant consultations will by your lordships meanes not onely doe it expeditely, and moderate the said fees; but also reforme the length of the said consultations, according to the formes of consultations in the Register.

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Answer.

It were fit the particular cause were set downe, whereupon the generall grievance, that is mentioned in this article, is grounded; and that done, it may have a full answer: for a prohibition is grounded upon the libell, and the consultation must agree therewith also; and therefore we doubt not, but the ground of this grievance, when it is well looked into, will grow from themselves in interlacing of much nugatory and unnecessary matter in their libells: and for the fees taken; wee assure our selves, none are taken, but such as are anciently due and accustomed; and it will appeare, that we have abridged the fees, and length of pleadings, and

and use no delays, but such as are of necessity, and we wish they would doe the like, and upon examination it will appeare of which side it growes, that the fees or delays are so intolerable. And where in ancient time such as sued for tithes, would not sue but for things questionable, and never fought at their parishioners hands their tithes in other kinds then anciently they had been used to have been paid; now many turbulent ministers do infinitely vex their parishioners for such kinds of tithes as they never had, whereby many parishes have been much impoverished: and for example, we shall shew one record, wherein the minister did demand seventeen severall kinds of tithes, whereupon the partie suing a prohibition had eight or nine of them adjudged against the minister upon demurrer in law, and other passed against him by tryall, and this must of necessity grow to a matter of great charge; but where is the fault, but in the minister that gave occasion? and we will shew one other record, wherein the party confessed to some of us, that hee was to sue his parishioner but for a calfe and a goose; and that his proctor neverthelesse put in the libell or demand of tithes, of seven or eight things more then he had cause to sue for: this enlarged the prohibition, and gave occasion of more expence then needed; and where is the fault of this, but in the ecclesiasticall courts? and as in these, so can wee approve in many others; and therefore wee must retort the cause and ground of this grievance upon themselves, as more particularly may appeare by the severall presidents to be shewed in this behalfe.

Prohibitions not to be granted upon frivolous suggestions.

9.

It it a prejudice and derision to both his majesties ecclesiasticall and temporall jurisdictions, that many prohibitions are granted upon trifling and frivolous suggestions, altogether unworthy to proceed from the one, or to give any hinderance or interruption to the other: as upon a suit of tithes brought by a minister against his parishioner, a prohibition flyeth out upon suggestion, that in regard of a speciall receipt, called a cup of buttered beere made by the great skill of the said parishioner to cure a grievous disease called a cold, which sorely troubled the said minister, all his tithes were discharged. And likewise a woman being convented for adultery committed with one that suspiciously resorted to her house in the night time, the suggestion of a prohibition in this case was, that *omnia placita de nocturnis ambulationibus* belong to the king, &c. Also where a legatary sued for his legacy given in a will, the prohibition was, *Quia omnia placita de donis et concessionibus spectant ad forum regium, et non ad forum ecclesiasticum, dammodo non fiat de testamento et matrimonio*; as if a legacy were not *donatio de or in testamento*, with many other of like sort. The reformation of all which frivolous proceedings, so chargeable notwithstanding to many poore men, and the great hinderance of justice, we humbly referre to your lordships consideration.

Objection.

We grant none upon frivolous suggestions, but for the case put, it is ridiculous in the minister to make such a contract (if any such were) but that maketh not the contract void, but discovereth the unworthinesse of the party that made the same, and yet no fault in granting the prohibition; but when it shall appeare unto us, that such a matter is suggested by fraud of any clerke or counseller

Answer.

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at law, we will not remit such offences, but will exclude such attorney from the court, and such counsellors from their practice at the barre. And if they will suggest adultery to one, against whom they prove but night walking, and doe adjudge him for it, we are in such a case to prohibite their proceedings: for that is a matter meerly pertinent to the temporall court; so, if it appeare hee hath entred the house as a thiefe, or a burglarer, and so in many other cases also. And if any surmise a legacy from the dead, where it was but a promise of payment in his life time, in that case such a suit is to be prohibited: but if in these cases the parties were named, then we might see the record, and thereupon be directed to shew upon what consideration these prohibitions were granted, otherwise wee shall thinke that these are cases newly invented.

10. No prohibition to be granted at his suit, who is plaintife in the Spirituall Court.

Objection.

We suppose it to be no warrantable nor reasonable course, that prohibitions are granted at the suit of the plaintife in the ecclesiasticall court, who having made choice thereof, and brought his adversary there into tryall, doth by all intendment of law and reason, and by the usage of all other judicall places conclude himselfe in that behalfe; and although he cannot be presumed to hope for helpe in any other court by way of prohibition, yet it is very usuall for every such person so proceeding onely of meere malice for vexation of the party, and to the great delay and hinderance of justice, to find favour for the obtaining of prohibitions, sometimes after two or three sentences, thereby taking advantage (as he must plead) of his owne wrong, and receiving aide from that court, which, by his owne confession, he before did contemne; touching the equity whereof, we will expect the answer of the judges.

Answer.

None may pursue in the ecclesiasticall court for that which the kings courts ought to hold plea of, but upon information thereof given to the kings courts, either by the plaintife, or by any meere stranger, they are to be prohibited, because they deale in that which appertaineth not to their jurisdiction, where if they would be careful not to hold plea of that which appertaineth not to them, this needed not: and if they will proceed in the kings courts against such as pursue in the ecclesiasticall courts for matter temporall, that is to be insisted upon them, which the quality of their offence requireth; and how many sentences howsoever are given, yet prohibitions thereupon are not of favour, but of justice to be granted.

11. No prohibition to be granted, but upon due consideration of the libell.

Objection.

It is (we are perswaded) a great abuse, and one of the chiefe grounds of the most of the former abuses, and many other, that prohibitions are granted without sight of the libell in the ecclesiasticall court; yea, sometimes before the libell be there exhibited, whereas by the lawes and statutes of this realme (as we thinke) the libell (being a brieve declaration of the matter in debate betweene the plaintife and defendant) is appointed as the only rule and direction for

for the due granting of a prohibition, the reason whereof is evident, *viz.* upon diligent consideration of the libell it will easily appeare, whether the cause belong to the temporall or ecclesiasticall cognizance, as on the other side without sight of the libell, the prohibition must needs range and roave with strange and forraigne suggestions at the will and pleasure of the devisor, nothing pertinent to the matter in demand: whereupon it cometh to passe, that when the judge ecclesiasticall is handling a matter of simony, a prohibition is grounded upon a suggestion, that the court tryeth *placita de advocationibus ecclesiarum, et de jure patronatus*. And when the libell containeth nothing but the demand of tithe wooll, and lamb, the prohibition surmisseth a custome of paying of tithe pigeons. So that if it may be made a matter of conscience to grant prohibitions only, where they doe rightly lye, or to preserve the jurisdiction ecclesiasticall united to his majesties crowne, it cannot (we hope) but seem necessary to your lordships, that due consideration be first had of the libell in the ecclesiasticall court, before any prohibition be granted.

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Answer.

Who hath an advowson granted to him for money, being sued for simony, shall have a prohibition; and it is manifest, that though in the libell there appeare no matter to grant a prohibition, yet upon a collaterall surmise the prohibition is to be granted: as where one is sued in a spirituall court for tithes of *silva cadua*, the party may suggest, that they were grosse or great trees, and have a prohibition, yet no such matter appeareth in the libell. So if one bee sued there for violent hands laid on a minister by an officer, as a constable, hee being sued there may suggest, that the plaintife made an affray upon another, and he to preserve the peace laid hands on him, and so have a prohibition. And so in very many other like cases, and yet upon the libell no matter appeareth why a prohibition should be granted: and they will never shew, that a custome to pay pigeons was allowed to discharge the payment of wooll, lamb, or such like.

No prohibition to be granted under pretence, that one witnesse cannot be received in the ecclesiasticall court, to ground a judgement upon.

12.

Objection.

There is a new devised suggestion in the temporall courts commonly received and allowed, whereby they may at their will and pleasure draw any cause whatsoever from the ecclesiasticall court: for example, many prohibitions have lately come forth upon this suggestion, that the lawes ecclesiasticall doe require two witnesses, where the common law accepteth of one; and therefore it is *contra legem terræ*, for the ecclesiasticall judge to insist upon two witnesses to prove his cause: upon which suggestion, although many consultations have been granted (the same being no way as yet able to warrant and maintaine a prohibition) yet because we are not sure, but that either by reason of the use of it, or of some future construction, it may have given to it more strength then is convenient, the same tending to the utter overthrow of all ecclesiasticall jurisdiction, we most humbly desire, that by your lordships good meanes, the same may be ordered to be no more used.

If the question be upon payment, or setting out of tithes, or upon the proove of a legacy, or marriage, or such like incidence,

Answer.

we are to leave it to the tryall of their law, though the party have but one witnesse; but where the matter is not determinable in the ecclesiasticall court, there lyeth a prohibition either upon, or without such a surmise.

13. No good suggestion for a prohibition, that the cause is neither testamentary, nor matrimoniall.

Objection.

As the former device last mentioned endeavoureth to strike away at one blow the whole ecclesiasticall jurisdiction; so there is another as usuall, or rather more frequent then the former, which is content to spare us two kind of causes to deale in, *viz.* testamentary, and matrimoniall: and this device insulteth mightily in many prohibitions, commanding the ecclesiasticall judge, that be the cause never so apparently of ecclesiasticall cognisance, yet hee shall surcease; for that is neither a cause testamentary, nor matrimoniall: which suggestion, as it grew at the first upon mistaking, and omitting the words, *de bonis et catallis*, &c. as may appeare by divers ancient prohibitions in the Register; so it will not be denied, but that, besides those two, divers and sundry other causes are notoriously knowne to be of ecclesiasticall cognisance, and that consultations are as usually awarded (if suit in that behalfe be prosecuted) notwithstanding the said suggestion, as their prohibitions are easily granted; which, as an injury, marching with the rest to wound poore men, protract suits, and prejudice the courts ecclesiasticall, we desire that the judges will be pleased to redresse.

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Answer.

If they observe well the answer to the former objections, they may be thereby satisfied, that we prohibit not so generally as they pretend, nor doe in any wise deale further then we ought to doe, to the prejudice of that which appertaineth to that jurisdiction; but when they will deale with matters of temporall contracts, coloured with pretended ecclesiasticall matter, wee ought to prohibit them with that forme of prohibitions, mentioning, that it concerneth not matter of marriage, nor testamentary: and they shall not find that we have granted any, but by form warranted, both by the Register, and by law: And when suggestions, carrying matter sufficient, appeare to us judicially to be untrue and insufficient, we are as ready to grant consultations as prohibitions: and we may not alter the forme of our prohibitions upon the conceits of ecclesiasticall judges, and prohibitions granted in the forme set downe in the article, are of that forme which by law they ought to be, and cannot be altered but by parliament.

14. No prohibition upon surmise onely to be granted, either out of the kings bench, or common pleas, but out of the chancery onely.

Objection.

Amongst the causes whereby the ecclesiasticall jurisdiction is oppressed with multitude of prohibitions upon surmises onely, this hath a chiefe place, in that through incroachment (as wee suppose) there are so many severall courts, and judges in them, that take upon them to grant the same, as in the kings bench five, and in the common pleas as many, the one court oftentimes crossing the proceedings of the other, whereas wee are perswaded, that all such kinds of prohibitions, being originall writs, ought onely to issue

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out of the chancery, and neither out of the kings bench, nor common pleas. And that this hath been the ancient practice in that behalfe, appeareth by some statutes of the realme, and sundry judgements at the common law; the renewing of which practice carrieth with it an apparant shew of great benefit and conveniency, both to the church, and to the subject: for if prohibitions were to issue onely out of one court, and from one man of such integrity, judgement, sincerity, and wisdom, as we are to imagine the lord chancelour of England to be endued with, it is not likely, that he would ever be induced to prejudice and pester the ecclesiasticall courts with so many needlesse prohibitions: or, after a consultation, to send out in one cause, and upon one and the same libell not altered, prohibition upon prohibition, his owne act remaining upon record before him to the contrary. The further consideration whereof, when, upon the judges answer thereunto, it shall be more thoroughly debated, wee must referre to your lordships honourable direction and wisdom.

A strange presumption in the ecclesiasticall judges, to require that the kings courts should not doe that which by law they ought to doe, and alwayes have done, and which by oath they are bound to doe! and if this shall be holden inconvenient, and they can in discharge of us obtaine some act of parliament to take it from all other courts then the chancery, they shall doe unto us a great ease: but the law of the realme cannot be changed, but by parliament; and what reliefe or ease such an act may worke to the subject, wise men will soone finde out and discern: but by these articles thus dispersed abroad, there is a generall unbeseeming aspersi-
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Answer

No prohibition to be awarded under a false pretence, that the ecclesiasticall judges would hold no plea for customes for tithes,

15.

Amongst many devices, whereby the cognizance of causes of tithes is drawn from ecclesiasticall judges, this is one of the chiefeft, viz. concerning the tryall of customes in payment of tithes, that it must be made in a temporall court; for upon a quirke and false suggestion in Edward the fourth his time, made by some sergeants, a conceit hath risen (which hath lately taken greater strength then before) that ecclesiasticall judges will allow no plea of custome or prescription, either in *non decimando*, or in *modo decimandi*; and thereupon, when contentious persons are sued in the ecclesiasticall court for tithes, and doe perceive, that upon good prooffe judgement will be given against them, even in their owne pleas, sometimes for customes, doe presently (knowing their own strength with jurors in the country) flie unto Westminster hall, and there suggesting that they pleaded custome for themselves in the ecclesiasticall courts, but could not be heard, doe procure thence very readily a prohibition; and albeit the said suggestion be notoriously false, yet the party prohibited may not bee permitted to traverse the same in the temporall court (directly contrary to a statute made in that behalfe): neither may the judge prohibited proceed without danger of an attachment, though himselfe doe certainly know, either that no such custome was ever alledged before him, or being alledged, that he did receive the same, and all manner of prooffes
11. INST. 3 Q 4 offered

Objection.

offered thereupon : which course seemeth the more strange unto us, because the ground thereof laid in Edward the fourth his time, as aforesaid, was altogether untrue, and cannot with any sound reason be maintained : divers statutes and judgements at the common law doe allow the ecclesiasticall courts to hold plea of such customes ; all our bookes and generall learning doe therewith concur, and the ecclesiasticall courts, both then and ever since, even untill this day, have, and still doe admit the same, as both by our ancient and recent records it doth and may to any most manifestly appeare. And besides, there are some consultations to bee shewed in this very point, wherein the said surmise and suggestion, that the ecclesiasticall judges will heare no plea of customes, is affirmed to be insufficient in law to maintaine any such prohibition : and therefore we hope, that if we shall be able, notwithstanding any thing the judges shall answer thereunto, to justifie the premises, your Lordships will be a meanes, that the abuses herein complained of, having so false a ground, may be amended.

Answer.

The temporall courts have alwayes granted prohibitions as well in cases *de modo decimandi*, as in cases upon reall compositions, either in discharge of tithes, or the manner of tithing : for that *modus decimandi* had his originall ground upon some composition in that kinde made, and all prescriptions and compositions in these cases are to be tryed at the common law, and the ecclesiasticall courts ought to be prohibited, if in these cases they had plea of tithes in kind : but if they will sue in the ecclesiasticall court *de modo decimandi*, or according to composition, then we prohibit them not : and the cause why the ecclesiasticall judges find fault herewith, is, because many ministers have growne of late more troublesome to their parishioners, then in times past ; and thereby worke unto these courts more commodity, whereas in former ages they were well contented to accept that which was used to be paid, and not to contend against any prescription or composition ; but now they grow so troublesome to their neighbours, as, were it not for the prohibition (as may appeare by the presidents before remembred) they would soone overthrow all prescriptions and compositions that are for tithes, which doth and would breed such a generall garboile amongst the people, as were to be pitied, and not to be permitted. And where they say, there bee many statutes that take away these proceedings from the temporall courts, they are much deceived ; and if they looke well unto it, they shall find even the same statutes (they pretend) to give way unto it. And it is strange they will affirme so great an untruth, as to say, they are not permitted to traverse the suggestion in the temporall court ; for both the law and daily practice doth allow it.

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16. The customes for tithes are onely to be tried in the ecclesiasticall courts, and ought not to be drawne thence by prohibitions.

Objection.

Although some indiscreet ecclesiasticall judges, either in the time of king Edward the fourth, or Edward the sixth, might, against law, have refused in some one cause to admit a plea of custome of tithes, to the prejudice of some person whom he favoured, and might thereby peradventure have given occasion of some one prohibition (but whether they did so or no, the suggestion of a lawyer for his fee is no good prooffe) yet forasmuch as by three statutes
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made since that time, wherein it is ordained, *viz.* both that tithes should be truly paid, according to the custome, and the tryall of such payments, according to custome upon any default or opposition, should be tryed in the kings ecclesiasticall courts, and by the kings ecclesiasticall lawes, and not otherwise, or before any other judges then ecclesiasticall, we most humbly desire your lordships, that if according to the said lawes we be most ready to heare any plea of customes your lordships would be pleased, that the judges may not be permitted hereafter to grant any prohibitions upon such false surmises; or if they shall answer, that wee mistake the said statutes, that then the said three statutes may bee thoroughly debated before your lordships, lest under pretence of a right, which they challenge, to expound these kind of statutes, the truth may be over-borne, and poore ministers still left unto country tryalls, there to iustifie the right of their tithes before unconscionable jurors in these cases.

The answer to the former article may serve for this; and where the objection seemeth to impeach the tryall at the common law by jurors, we hold, and shall be able to approve it to be a farre better course for matter of fact upon the testimonie of witnesses, sworne *viva voce*, then upon the conscience of any one particular man, being guided by paper proofes; and we never heard it excepted unto heretofore, that any statute should be expounded by any other then the judges of the land; neither was there ever any so much over-seen, as to oppose himselfe against the practice of all ages to make that question, or to lay any such unjust imputation upon the judges of the realme.

Answer.

No prohibition to be granted, because the treble value of tithes is sued for in the ecclesiasticall court. 17.

Whereas it appeareth plainly by the tenour of the statute of Edw. 6. cap. 13. that judges ecclesiasticall; and none other, are to heare and determine all suits of tithes, and other duties for the same, which are given by the said act; and that nothing else is added to former lawes by that statute, but onely certaine penalties, for example, one of treble value: forasmuch as the said penalty, being onely devised as a meanes to worke the better payment of tithes, and for that there are no words used in the said statute to give jurisdiction to any temporall court, we hold it most apparrant, that the said penalty of treble value, being a duty given in the said statute for non-payment of tithes, cannot bee demanded in the temporall court, but onely before the ecclesiasticall judges, according to the expresse words of the said statute: and the rather, wee are so perswaded, because it is most agreeable to all lawes and reason, that where the principall cause is to bee decided, there all things incident and accessory are to bee determined. Besides, it was the practice of all ecclesiasticall courts in this realme, immediately after the making of the said statute, and hath continued so ever since to award treble damages (when there hath been cause) without any opposition, untill about ten yeares past, when, or about which time, notwithstanding the premises, the temporal judges began to hold plea of treble value, and doe now accompt it so proper and peculiar to their jurisdictions, as by colour thereof they admit suits originally for the said penalty, and doe make thereby

Objection.

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(very absurdly) the penalty of treble value to bee principall, which is indeed but the accessary; and the cognizance of tithes to bee but the accessary, which in all due construction is most evident to be the principall, thereby wholly perverting the true meaning and drift of that statute, whereupon if in the spirituall court the treble value be now demanded by the libell as a duty, according to that statute, or that sentence be awarded directly and sincerely upon the said libell, presently, as contentious persons are disposed, a prohibition is granted, and some sharp words are further used, as if the ecclesiasticall judges were in some further danger for holding of these kind of pleas: and therefore we most humbly desire, that if the judges shall insist in their answers upon such their straining of the said statute, your lordships will be pleased to heare the same further debated by us with them.

Answer.

If they observe well the statute, they shall find, that the ecclesiasticall court is by that statute to hold plea of no more, then that which is specially thereby limited for them to hold plea of; and the temporall court not restrained thereby, to hold plea of that which is not limited unto the ecclesiasticall court by that act, and of that they had jurisdiction of before: and the forfeiture of double value is expressly limited to be recovered before the ecclesiasticall judges; but where a forfeiture is given by an act generally not limiting where to be recovered, it is to be recovered in the kings temporall courts, and the cause why it is so divided, seemeth to be for that, where by that act, temporall men were to sue for their tithes in the ecclesiasticall court, where it was then presumed they were to have no great favour: therefore the party grieved might (if he would) pursue for the forfeiture of the treble value in the temporall court, where hee was to recover no tithes; but if he would sue where he might also recover the tithes, then hee would pursue for the double value: for that is specially appointed to be recovered in the ecclesiasticall court, but not the treble value. And although they alledge, that they sometimes used to maintaine suit for the treble value, yet as soon as that was complained of to the kings courts, they gave remedy unto it as appertained.

18. No prohibition to be awarded, where the person is stopp'd from carrying away of his tithes by him that setteth them forth.

Objection.

As the said statute of Edward the sixth last mentioned assigneth a penalty of treble value, if a man upon pretence of custome, which cannot be justified, shall take away his corne before he hath set out his tithes; so also in the said statute it is provided, that if any man having set out his tithes, shall not afterwards suffer the parson to carry them away, &c. he shall pay the double value thereof so carried away, the same to be recovered in the ecclesiasticall court. Howbeit the clearnesse of the statute in this point, notwithstanding meanes are found to draw this cause also from the ecclesiasticall court; for such as of hatred towards their ministers are disposed to vex them with suits at the common law (where they finde more favour to maintaine their wrangling, then they can hope for in the ecclesiasticall court) will not faile to set out their tithes before witnesses, but not with any meaning or intent that the parson shall ever carry them away; for presently thereupon they will cause their owne servants to load them away to their owne

owne barnes, and leave the parson as he can to seek his remedy; which if he do attempt in the ecclesiasticall court, out cometh a prohibition, suggesting, that upon severance and setting forth of the tenth part from the nine, the same tenths were presently by law in the parsons possession, and being thereupon become a lay chattell, must be recovered by an action of trespassse at the common law, whereas the whole pretence is grounded upon a meere perverting of the statute, which doth both ordain, that all tithes shall be set forth truly and justly without fraud and guile; and that also the parson shall not be stopped or hindered from carrying them away, neither of which conditions are observed when the farmer doth set them forth, meaning to carry them away himselfe (for that is the fraudulent setting of them out;) and also, when accordingly hee taketh them away to his own use; for thereby hee stoppeth the parson to carry them away: and consequently, the penalty of this offence is to bee recovered in the said ecclesiasticall courts, according to the words of the said statute, and not in any court temporall: wherefore we most humbly desire your lordships, that either the judges may make it apparant to your lordships, that we mislike this statute in this point, or that our ecclesiasticall courts may ever hereafter be freed from such kinds of prohibitions.

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For the matter of this article it is answered before, and where the truth of the case is, that he that ought to pay prediall tithes, doth not divide out his tithes, or doth in any wise interrupt the parson or his deputy, to see the dividing or setting of them out: that appearing unto us judicially, we maintain no prohibition upon any suit there for the double value, but if after the tithes severed, the parson will sell the tithes to the party that divided them, upon the surmise thereof, we doe, and ought to grant a prohibition; but if that surmise doe prove untrue, we do as readily grant a consultation, and the party seeking the same, is, according to the statute, to have his double costs and damages.

Answer.

No prohibition to be granted upon any incident plea in an ecclesiasticall cause.

19.

We conceive it to be great injury to his majesties ecclesiasticall jurisdiction, that prohibitions are awarded to his ecclesiasticall courts upon every by, and every incident plea or matter alledged there in barre, or by way of exception, the principall cause being undoubtedly of ecclesiasticall cognizance: for example, in suit for tithes in kind, if the limits of the parish, agreements, compositions, and arbitruments, as also whether the minister that sueth as parson, be indeed parson or vicar, doe come in debate by way of barre, although the same particulars were of temporall cognizance (as some of them wee may boldly say are not) yet they were in this case examinable in the ecclesiasticall court, because they are matters incident, which come not in that case finally to be sentenced and determined, but are used as a meane and furtherance for the decision of the maine matter in question. And so the case standeth in other such incident pleas by way of barre; for otherwise either party in every cause might at his pleasure, by pleading some matter temporall by way of exception, make any cause ecclesiasticall whatsoever subject to a prohibition, which is contrary to the reason of the common law, and sundry judgements thereupon given.

Objection.

given, as wee hope the judges themselves will acknowledge, and thereupon yeeld to have such prohibitions hereafter restrained.

Answer.

Matters incident that fall out to be meere temporall, are to be dealt withall in the temporall, and not in the ecclesiastical court, as is before particularly set downe in the eleventh article.

20.

That no temporall judges, under colour of authority to interpret statutes, ought, in favour of their prohibitions, to make causes ecclesiasticall to be of temporall cognizance.

Objection.

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Although of late dayes it hath been strongly held by some, that the interpretation of all statutes whatsoever doe belong to the judges temporall, yet we suppose, by certain evil effects, that this opinion is to bee bounded within certaine limits; for the strong conceit of it hath already brought forth this fruit, that even those very statutes which doe concerne matters meerly ecclesiasticall, and were made of purpose with great caution, to preserve, enlarge, and strengthen the jurisdiction ecclesiasticall, have been by colour thereof turned to the restraining, weakening, and utter overthrow of the same, contrary to the true intent and meaning of the said statutes: as for example (besides the strange interpretation of the statutes before mentioned, for the payment of tithes) when parties have been sued in the ecclesiastical courts, in case of an incestuous marriage, a prohibition hath been awarded, suggesting, under pretence of a statute in the time of king Hen. 8. that it appertaineth to the temporall courts, and not to the ecclesiasticall, to determine what marriages are lawfull, and what are incestuous by the word of God. As also a minister, being upon point of deprivation for his insufficiency in the ecclesiasticall court, a prohibition was granted, upon suggestion that all pleas of the fitnessse, learning, and sufficiency of ministers belong only to the kings temporall courts, relying, as wee suppose, upon the statute of 13 Eliz. by which kind of interpretation of statutes, if the naming, disposing, or ordering of causes ecclesiasticall in a statute shall make the same to be of temporal cognizance, and so abolish the jurisdiction of the ecclesiasticall court, without any further circumstances, or expresse words to warrant the same, it followeth, that forasmuch as the common book and articles of religion are established and confirmed by severall acts of parliament, the temporall judges may challenge to themselves an authority to end and determine of all causes of faith and religion, and to send out their prohibitions, if any ecclesiasticall judge shall deale or proceed in any of them: which conceit, how absurd it is, needeth no prooffe, and teacheth us, that when matters meerly ecclesiasticall are comprized in any statute, it doth not therefore follow, that the interpretation of the said matters doth belong to the temporall judges, who by their profession, and as they are judges, are not acquainted with that kind of learning: hereunto, when we shall receive the answer of the judges, we shall be ready to justifie every part of this article.

Answer.

If any such have slipt, as is set downe in this article, without other circumstances to maintaine it, we make no doubt, but when that appeared to the kings temporall court, it hath been presently remitted; and yet there be cases, that we may deale both with marriages and matters of deprivation, as where they will call the marriage in question after the death of any of the parties, the marriage

marriage may not then be called in question, because it is to bastard and disinherite the issues, who cannot so well defend the marriage, as the parties both living themselves might have done; and so is it, if they will deprive a minister not for matter appertaining to the ecclesiasticall cognizance, but for that which doth meerly belong to the cognizance of the kings temporall courts. And for the judges expounding of statutes that concerne the ecclesiasticall government or proceedings, it belongeth unto the temporall judges; and wee thinke they have been expounded as much to their advantage, as either the letter or intention of lawes would or could allow of. And when they have been expounded to their liking, then they could approve of it; but if the exposition be not for their purpose, then will they say, as now they doe, that it appertaineth not unto us to determine of them.

That persons imprisoned upon the writ of *de excommunicato capiendo* are unduly delivered, and prohibitions unduly awarded for their greater security. 21.

Forasmuch as imprisonment upon the writ of *excommunicato capiendo* is the chiefest temporall strength of ecclesiasticall jurisdiction, and that by the lawes of the realm none so committed for their contempt in matters of ecclesiasticall cognizance, ought to be delivered untill the ecclesiasticall courts were satisfied, or caution given in that behalfe, we would gladly be resolved by what authority the temporall judges do cause the sherifes to bring the said parties into their courts, and by their owne discretions set them at liberty, without notice thereof first given to the ecclesiasticall judges, or any satisfaction made either to the parties at whose suit he was imprisoned, or the ecclesiasticall court, where certaine lawfull fees are due: and after all this, why doe they likewise send out their prohibitions to the said court, commanding, that all censures against the said parties shall be remitted, and that they be no more proceeded with for the same causes in those courts. Of this our desire, we hope your lordships do see sufficient cause, and will therefore procure us from the judges some reasonable answer. Objection. [615]

We affirme, if the party excommunicate be imprisoned, wee ought upon complaint to send the kings writ for the body and the cause, and if in the returne no cause, or no sufficient cause appeare, then we doe (as we ought) set him at liberty; otherwise, if upon removing the body, the matter appeare to be of ecclesiasticall cognizance, then we remit him againe; and this we ought to doe in both cases; for the temporall courts must alwaies have an eye, that the ecclesiasticall jurisdiction usurp not upon the temporall. Answer.

The kings authority in ecclesiasticall causes is greatly impugned by prohibitions. 22.

We are not a little perplexed touching the authority of his majestie in causes ecclesiasticall, in that we find the same to be so impeached by prohibitions, that it is in effect thereby almost extinguished; for it seemeth, that the innovating humour is growne so rank, and that some of the temporall judges are come to be of opinion, that the commissioners appointed by his majesty for his causes Objection.

causes ecclesiasticall (having committed unto them the execution of all ecclesiasticall jurisdiction annexed to his majesties imperiall crowne, by virtue of an act of parliament made in that behalfe, and according to the tenour and effect of his majesties letters patents, wherein they are authoris'd to imprison, and impose fines, as they shall see cause) cannot otherwise proceed, the said act and letters patents notwithstanding, then by ecclesiasticall censures onely: and thereupon of latter dayes, whereas certaine lewd persons (two for example sake) one for notorious adultery and other intolerable contempts, and another for abusing of a bishop of this kingdome with threatening speeches, and sundry railing termes (no way to be endured) were thereupon fined and imprisoned by the said commissioners, till they should enter into bonds to performe further orders of the said court; the one was delivered by an *habeas corpus* out of the kings bench, and the other by a like writ out of the common pleas: and sundry other prohibitions have been likewise awarded to his majesties said commissioners upon these suggestions, *viz.* that they had no authority either to fine or imprison any man; which innovating conceit being added to this that followeth, That the writ of *de excommunicato capiendo* cannot lawfully be awarded upon any certificate or *significavit* made by the said commissioners, wee find his majesties said supreme authority in causes ecclesiasticall (so largely amplified in sundry statutes) to be altogether destitute in effect of any meanes to uphold it, if the said proceedings by temporall judges shall be by them maintained and justified; and therefore wee most humbly desire your lordships, that they may declare themselves herein, and be restrained hereafter (if there be cause found) from using the kings name in their prohibitions, to so great prejudice of his majesties said authority, as in debating the same before your lordships will hereafter more fully appeare.

Answer.

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We doe not, neither will we in any wise impugne the ecclesiasticall authority in any thing that appertaineth unto it; but if any by the ecclesiasticall authority commit any man to prison, upon complaint unto us that he is imprisoned without just cause, we are to send to have the body, and to be certified of the cause; and if they will not certifie unto us the particular cause, but generally, without expressing any particular cause, whereby it may appeare unto us to be a matter of the ecclesiasticall cognizance, and his imprisonment be just, then we doe and ought to deliver him: and this is their fault, and not ours. And although some of us have dealt with them to make some such particular certificate to us, whereby wee may bee able to judge upon it, as by law they ought to doe, yet they will by no meanes doe it; and therefore their error is the cause of this, and no fault in us: for if we see not a just cause of the parties imprisonment by them, then we ought, and are bound by oath to deliver him.

23. No prohibition to be granted, under pretence to reforme the manner of proceedings by the ecclesiasticall lawes, in causes confessed to be of ecclesiasticall cognizance.

Objection.

Notwithstanding that the ecclesiasticall jurisdiction hath been much impeached heretofore through the multitude of prohibitions, yet the suggestions in them had some colour of justice, as pretending,

pretending, that the judges ecclesiasticall dealt with temporall causes: but now, as it seemeth, they are subject to the same controlments, whether the cause they deale in be either ecclesiasticall or temporall, in that prohibitions of late are wrestled out of their owne proper course, in the nature of a writ of error, or of an appeal: for, whereas the true and onely use of a prohibition is to restraine the judges ecclesiasticall from dealing in a matter of temporall cognizance, now prohibitions are awarded upon these surmises, *viz.* that the libell, the articles, the sentence, and the ecclesiasticall court, according to the ecclesiasticall lawes, are grievous and insufficient, though the matter there dealt withall be meerly ecclesiasticall: and by colour of such prohibitions, the temporall judges to alter and change the decrees and sentences of the judges ecclesiasticall, and to moderate the expences taxed in the ecclesiasticall courts, and to award consultations upon conditions: as for example, that the plaintife in the ecclesiasticall court shall except of the one halfe of the costs awarded, and that the register shall lose his fees; and that the said plaintife shall be contented with the payment of his legacy, which was the principall sued for, and adjudged due unto him at such day, as they the said temporall judges shall appoint, or else the prohibition must stand. And also where his majesties commissioners, for causes ecclesiasticall, have not been accustomed to give a copy of the articles to any party, before he hath answered them; and that the statute of Hen. 5. touching the delivering of the libell, was not onely publicly adjudged in the kings bench, not to extend to the deliverance of articles, where the party is proceeded with *ex officio*, but likewise imparted to his majestie, and afterwards divulged in the starre-chamber, as a full resolution of the judges, yet within 4 or 5 moneths after, a prohibition was awarded to the said commissioners out of the kings bench, upon suggestion, that the party ought to have a copy of the articles, being called in question *ex officio*, before he should answer them; and notwithstanding that a motion was made in full court shortly after for a consultation, yet an order was entred, that the prohibition should stand untill the said partie had a copy of the said articles given him; which novell and extraordinary courses doe seem very strange unto us, and are contrary not onely to the whole course of his majesties lawes ecclesiasticall, but also to the very maximes and judgement of the common law, and sundry statutes of this realme, as wee shall be ready to justifie before your lordships, if the judges shall endeavour to maintaine these their proceedings.

To this we say, that though where parties are proceeded withall *ex officio*, there needeth no libell, yet ought they to have the cause made knowne unto them for which they are called *ex officio*, before they be examined, to the end it may appeare unto them before their examination, whether the cause be of ecclesiasticall cognizance, otherwise they ought not to examine them upon oath. And touching the rest of this article, they doe utterly mistake it.

Answer.

That temporall judges are sworne to defend the ecclesiasticall jurisdiction.

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24.

We may not omit to signifie unto your lordships, that (as wee take it) the temporall judges are not onely bound by their ancient oath,

Objection.

oath, that they shall doe nothing to the dis-herison of the crown, but also by a latter oath unto the kings supremacy, wherein they doe sweare, that, to their power, they will assist and defend all jurisdictions, priviledges, preheminences, and authorities united and annexed to the imperiall crowne of this realme; in which words the ecclesiasticall jurisdiction is specially aimed at: so that whereas they doe oftentimes insist upon for their oath, for doing of justice in temporall causes, and do seldome make mention of the second oath taken by them for the defence of the ecclesiasticall jurisdiction, with the rights and immunities belonging to the church; we think, that they ought to weigh their said oaths better together, and not so farre to extend the one, as that it should in any sort prejudice the other: the due consideration whereof (which we most instantly desire) would put them in mind (any suggestion to the contrary notwithstanding) to be as carefull not to doe any thing that may prejudice the lawfull proceedings of the ecclesiasticall judges in ecclesiasticall causes, as they are circumspect not to suffer any impeachment, or blemish of their owne jurisdictions and proceedings in causes temporall.

Answer.

We are assured, that none can justly charge any of us with violating our oaths, and it is a strange part to taxe judges in this manner, and to lay so great an imputation upon us; and what scandall it will be to the justice of the realme to have so great levity, and so foule an imputation laid upon the judges, as is done in this, is too manifest. And we are assured it cannot be shewed, that the like hath been done in any former age; and for lesse scandals then this of the justice of the realme, divers have been severely punished.

25. That excommunication is as lawfull, as prohibition, for the mutuall preservation of both his majesties supreme jurisdiction.

Objection.

To conclude, whereas for the better preserving of his majesties two supreme jurisdictions before mentioned, *viz.* the ecclesiasticall and the temporall, that the one might not usurp upon the other, two meanes heretofore have of ancient time been ordained, that is to say, the censure of excommunication, and the writ of prohibition; the one to restrain the incroachment of the temporall jurisdiction upon the ecclesiasticall, the other of the ecclesiasticall upon the temporall, we most humbly desire your lordships, that by your meanes the judges may be induced to resolve us, why excommunications may not as freely be put in ure for the preservation of the jurisdiction ecclesiasticall, as prohibitions are, under pretence to defend the temporall, especially against such contentious persons, as doe wittingly and willingly, upon false and frivolous suggestions, to the delay of justice, vexation of the subjects, and great scandall of ecclesiasticall jurisdictions, daily procure, without feare either of God or men, such undue prohibitions, as we have heretofore mentioned.

Answer.

The excommunication cannot be gain-said, neither may the prohibition be denied upon the surmise made, that the matter pursued in the ecclesiasticall court is of temporall cognizance, but as soon as that shall appeare unto us judicially to be false, we grant the consultation.

For

For the better satisfaction of his majesty, and your lordships, touching the objections delivered against prohibitions, we have thought good to set downe (as may be perceived by that which hath been said) the ordinary proceeding in his majesties courts therein; whereby it may appeare both what the judges doe, and ought to doe in those causes; and the ecclesiasticall judges may doe well to consider, what issue the course they herein hold can have in the end: and they shall find it can be no other, but to cast a scandall upon the justice of the realme; for the judges doing but what they ought, and by their oaths are bound to doe, it is not to be called in question: and if it fall out, that they erre in judgement, it cannot otherwise be reformed, but judicially in a superiour court, or by parliament.

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Subscribed by all the judges of England, and the barons of the exchequer, Pasch. 4 *Jacobi*, and delivered to the lord chancellor of England.

Which answers and resolutions, although they were not enacted by authority of parliament, as our statute of *Articuli Cleri* in 9 E. 2. was; yet, being resolved unanimously by all the judges of England, and barons of the exchequer, are for matters in law of highest authority next unto the court of parliament.

Magna est veritas, et prevailet.

But now we will peruse the preamble, and after every chapter in order, and proceed to the exposition of the same; which office the clergy claimed, viz. to interpret all statute lawes concerning the clergy; but it was resolved by all the judges of England, that the interpretation of all statutes concerning the clergy, being parcell of the lawes of the realme, doe belong to the judges of the common law.

Artic' Cleri.
3 Jac. ad artic.
20.

EDWARDUS Dei gratia rex Angliæ, &c. omnibus ad quos præsentis literæ pervenerint, salutem. Sciatis quod cum dudum, temporibus progenitorum nostrorum quondam regum Angliæ, in diversis parliamentis suis (1); et similiter postquam regni nostri gubernacula suscepimus, in parliamentis nostris (2), per prælatos, et clerum (4) regni nostri plures articuli continentes gravamina aliqua ecclesiæ Anglicanæ, et ipsis prælatis et clero illata (ut in eisdem asserebatur) porrecti fuissent, et cum instantia supplicatum, ut inde apponeretur remedium opportunum: ac nuper in parlamento nostro apud Lincoln', anno regni nostri ix. (3) articulos subscriptos, et quasdam responsiones ad aliquos eorum prius factas, coram concilio nostro recitari, ac quasdam responsiones corrigi, et cæ-

II. INST.

teris

THE king to all to whom, &c. sendeth greeting. Understand ye, That whereas of late times of our progenitors sometimes kings of England, in divers their parliaments, and likewise after that we had undertaken the governance of the realm, in our parliaments many articles containing divers grievances (committed against the church of England, the prelates and clergy) were propounded by the prelates and clerks of our realm; and further, great instance was made that convenient remedy might be provided therein: and of late in our parliament holden at Lincoln, the ninth year of our reign, we caused the articles underwritten, with certain answers made to some of them heretofore, to be rehearsed before our council, and made certain answers

3 R

to

teris articulis subscriptis per nos, et dictum concilium nostrum fecerimus responderi: quorum quidem articulorum et responsum tenores subsequuntur in hunc modum.

to be corrected; and to the residue of the articles underwritten, answers were made by us and our council; of which said articles, with the answers of the same, the tenors here ensue.

(1) *Cum dudum temporibus progenitorum nostrorum, &c. in diversis parliamentis.*] That is, in the said parliament holden anno 51 H. 3. Articuli Cleri, and of the said acts in the raigne of E. 1. called *prohibitio formata super Artic' Cleri*, and *Articuli contra prohibitionem regiam*, which have been cited before.

Rot. parl. 5 E. 2.
m. 3. & 8 E. 2.

(2) *In parliamentis nostris.*] *Viz.* 5 E. 2. & 8 E. 2.

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Vid. artic' Cler'
anno 3 Jacobi
regis ad artic' 1.
& 13.

(3) *Ac nuper in parlamento nostro apud Lincoln' anno regni nostri nono.*] There were two parliaments holden in this ninth yeare, viz. the one at Lincolne, 15 Hill. mentioned in this preamble; and the other, 15 Pasch' anno nono at Westminster: and as one saith, *Merito in parlamento conquesti sunt, quia lex Angliæ sine parlamento mutari non potest.*

And note well what is said there, viz. what the law doth warrant in cases of prohibition, to keep every jurisdiction in his true limits, cannot be altered but by parliament.

Vid. ubi supra
ad artic' 3.
Vid. ad artic'
10. 21.

(4) *Per prælatos et clerum, &c.*] In these parliaments complaint was made by the clergy onely; but the kings courts, that may award prohibitions, being informed by the parties themselves, or by any stranger, that any court temporall or ecclesiasticall doe hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgement and execution, as before; and so resolved by all the judges of England, and barons of the exchequer, agreeable to make authorities in law.

C A P. I.

IN PRIMIS laici impetrant prohibitiones in genere super decimis, obventionibus, oblationibus, mortuariis, redemptionibus penitentiarum, violenta manuum iniectione in clericum vel conversum, et in causa diffamationis: in quibus casibus agitur ad pœnam canonicam imponendum: rex ad istum articulum respondit, quod in decimis, oblationibus, obventionibus, mortuariis, quando sub istis nominibus proponuntur, prohibitioni regię non est locus; etiamsi, propter detractionem istorum diuturnam, ad æstimationem eorundem pecuniariam veniatur. Sed si clericus, vel religiosus decimas suas in horreo suo

FIRST, whereas lay-men do purchase prohibitions generally upon tythes, obventions, oblations, mortuaries, redemption of penance, violent laying hands on clerks or converts, and in cases of defamation, in which cases spiritual penance ought to be enjoined; the king doth answer to this article, that in tythes, oblations, obventions, mortuaries (when they are propounded under these names) the king's prohibition shall hold no place, although for the long withholding of the same the money may be esteemed at a sum certaine. But if a clerk or a religious man

congregatas, vel alibi existentes venderit alicui pro pecunia: si petatur pecunia coram iudice ecclesiastico, locum habet regia prohibitio, quia per venditionem res spirituales fiunt temporales, et transeunt decimæ in catalla.

man do sell his tythes being gathered in his barn, or otherwise, to any man for money, if the money be demanded before a spiritual judge, the king's prohibition shall lie; for by the sale the spiritual goods are made temporal, and the tythes turned into chattles.

(8 Ed. 4. 13. Cro. El. 753. 12 Rep. 29. 13 Rep. 41. Rast. 484, &c.)

Of these sufficient hath been said in the exposition upon the statute of *Circumspecte agatis*: whereunto we referre the reader; only this wee may adde (which wee have reserved to this place) the resolution of all the judges of England to the 5. 8. 15. 16. 18. articles in *Artic' Cleri*, 3 *Jacobi regis*, in many cases concerning tithes, &c.

C A P. II.

ITEM si sit contentio de jure decimarum, originem habens de jure patronatus, et earundem decimarum quantitas ascendat ad quartam partem bonorum ecclesiæ, locum habeat regia prohibitio, si hæc causa coram iudice ecclesiastico ventilet'. Item, si prælatus imponat pœnam pecuniariam alicui pro peccato (1), et repetat illam, regia prohibitio locum habet.

[620] Veruntamen, si prælati imponant pœnitentias corporales, et sic puniti velint hujusmodi pœnitentias per pecuniam redimere sponte, non habet locum regia prohibitio, si coram prælatis pecunia ab eis exigatur.

ALSO if debate do arise upon the right of tythes, having his original from the right of the patronage, and the quantity of the same tythes do come unto the fourth part of the goods of the church, the king's prohibition shall hold place, if the cause come before a judge spiritual. Also if a prelate enjoin a penance pecuniary to a man for his offence, and it be demanded, the king's prohibition shall hold place. But if prelates enjoin a penance corporal, and they which be so punished will redeem upon their own accord such penances by money, if money be demanded before a judge spiritual, the king's prohibition shall hold no place.

(Co. 465. Regist. 35.)

This is intended of the kings writ of *indicavit*, whereof, and of the tryall of the right of tithes at the common law, we have spoken sufficiently for the understanding of this branch of this act, in the exposition of the statute of W. 2. cap. 5. *versus finem*, and the statute of *circumspecte agatis*, &c.

Vid. Registr. 48, &c.

(1) Item, si prælatus imponat pœnam pecuniariam alicui pro peccato, &c.] For the understanding hereof, wee referre the reader to the exposition upon the statute of *Circumspecte agatis*, where sufficient hath been said of this matter.

CAP. III.

INSUPER, si aliquis violentas manus injecerit in clericum, pro violentia facta debet emendari coram rege: pro excommunicatione vero, coram prælato, ubi imponatur pœnitentia corporalis; quod si reus velit sponte per pecuniam redimere, dand' prælato: vel læso, potest repeti coram prælato: nec in talibus regia prohibitio locum habet.

MOREOVER, if any lay violent hands on a clerk, the amends for the peace broken shall be before the king, and for the excommunication before a prelate, that penance corporal may be enjoined; which if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, it shall be required before the prelate, and the king's prohibition shall not lie.

(Regist. 51, 52. 57.)

For this matter, we referre the reader to the statute of *Circumspecte agatis*: to that we adde the resolution of all the judges of England touching this matter, *ad Artic' 6. & 11. in Articulis Cleri, 3 Jacob.* which you may reade before, since we began with this statute.

And here it is to be noted, that where the article of the clergy, cap. 1. *de violenta manuum injectione in clericum vel conversum*, answer is made to the clerke, but no answer is made at all to the convert.

CAP. IV.

IN diffamationibus etiam corrigant prælati supradicto modo, regia prohibitione non obstante, primo injungendo pœnam corporalem: quam si reus velit reaimere sibi, percipiat prælatus pecuniam, licet regia prohibitio porrigatur.

IN defamations also prelates shall correct in manner abovesaid, the king's prohibition notwithstanding; first injoyning a penance corporal, which if the offender will redeem, the prelate may freely receive the money, though the king's prohibition be shewed.

(4 Rep. 20. Regist. 49. Rast. 487, &c.)

Hereof also sufficient hath been said in the exposition upon the statute of *Circumspecte agatis*.

CAP. V.

ITEM, si aliquis in fundo suo molendinum erexit de novo, et postea à restore loci exigatur decima de eodem, exhibetur regia prohibitio sub hac forma :

Quia de tali molendino hætenus decimæ non fuerunt solutæ, prohibemus, &c. et sententiam excommunicationis, si quam hac occasione promulgaveritis, revocetis omnino.

Responsio: In tali casu nunquam exiit regia prohibitio de principis voluntate (1), qui et decernit talem perpetuo non exire.

ALSO if any do erect in his ground a mill of new, and after the parson of the same place demandeth tithe for the same, the king's prohibition doth issue in this form:

The answer. In such case the king's prohibition was never granted by the king's assent, nor never shall, which hath decreed that it shall not hereafter lie in such cases.

See hereafter the exposition of the statute of 2 E. 6. cap. 17. verb. by the lawes of the realme. Vid. inter leges Edwardi regis, cap. 8. fo. 128. (1 Roll, 405. 2 Roll, 84.)

The forme of this prohibition is justly condemned, for that the substance of it was a *non decimando*, because the mill was newly erected; but yet hereby, and by our bookes it appeareth, that some tithe or other is due for a mill, be it new, or old.

But this is (as some doe hold) a personall^a tithe, coming from the gaine of the miller, by his industry and labour: as of a fisherman of the tithe of his gain by fishing, called *decimæ de piscationibus*, or the like.

The words are generall, *molendinum erexit*, and doe extend to all kind of mills, as private mills, and to publike, as to fulling mills, paper mills, &c. whereof there is no tithe to bee paid, but personall, if any bee; which is a good prooffe (say they) that so it ought to be of corne mills; and if the parson should have the tenth toll-dish, then should he have not onely tithe corne, but also tithe of the same corne ground at the mill, and so a double tithe, which he shall not have of a fulling mill, paper mill, &c. No tithe shall be demanded of the rawyn, or after-pasture, or of stubble, because the parson shall not have a double tithe of one and the same thing in one yeare. If the parson hath tithe of fruit that groweth on fruit-trees, and in the same yeare the owner fell downe the fruit-trees, and make billets or fagots of them, he shall have no tithe of them, as it was holden Hill. 8 Jacob. Rot. 1109. *in communi banco, inter Baxter & Hopes.*

^b Every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty, being such kind of persons, and in such places, as heretofore, within 40 yeares, before the statute of 2 E. 6. have accustomedly used to pay such personall tithes, or of right ought to pay, other then such as be common day-labourers, shall yearly, before the feast of Easter, pay for his personall

See 2 E. 6. c. 13. every person shall justly, &c. set out, yeeld, and pay all prediall tithes in their proper kind, as they rise, and happen, &c. which (say they) cannot be applyed to the taking of the toll-dish. Registr. 48. b. F.N.B. 51. h. ^a Rot. claus. 7 E. 2. Decimæ de molendino Ewell. Mich. 3 & 9 H. 3. coram rege, rot. 6. See Linwood, tit. de Decimis, fol. 141, 142. Mich. 9 & 10 H. 3. coram rege, rot. 15 Jo. Fitzroberts case.

^b 2 E. 6. cap. 13.

sonall tithes the tenth part of his cleare gaines, his charges and expences, according to his estate, condition, or degree, to be therein abated, allowed, or deducted, &c. And the ordinary hath power to call the parties before him, and to examine them by all lawfull and reasonable meanes, other then upon oath, concerning the true payment of personall tithes.

Nota, in this description of personall tithes, the words be, clothing, handicraft, or other art and faculty; within which generall words, the millers of fulling mills, rape mills, corne mills, and other mills be included; for a miller is of an art and faculty.

* Mich. 25 &
26 El. rot. 2617.
in communi
banco.

Mich. 29 & 30
Eliz. rot. 254.
Nicholas Mus-
sels case, ibid.
Vid. lib. 11. fol.
48, 49. & 81.

[622]

Exigatur decima] Some do hold, that the parson shall have the tenth toll-dish, as a prediall tithe.

* He that desireth to reade more concerning this matter, let him search for two records of prohibitions in the court of common pleas, in the raigne of the late queen Elizabeth.

Note, that in many cases the common law and the canon law differ concerning the payment of tithes; the common law adjudging many things not tithable, which by the canon law ought to pay tithes: and this case of tithes of mills was never (that I know) judicially determined.

See the exposition of the statute of *Circumspecte agatis, verbo Consuet'*.

(1) *De principis (i. regis) voluntate.*] *i. Curie regis, in qua rex sive princeps representatur.*

C A P. VI.

ITEM, si aliqua causa, vel negotium, cujus cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico iudice fuerit sententialiter terminatum, et transierit in rem judicatam (1), nec per appellationem fuerit suspensum, et postmodum coram iudice seculari, super eadem re inter easdem personas questio moveatur, et probetur per testes vel instrumenta, talis exceptio in foro seculari non admittatur. Responsio: Quando eadem causa diversis rationibus (2) coram iudicibus ecclesiasticis et secularibus ventilatur, ut supra patet de iniectione violentarum manuum in clericum, dicunt quod (non obstante ecclesiastico iudicio) curia regis ipsum tractat negotium, ut sibi expedire videtur.

ALSO if any cause or matter, the knowledge whereof belongeth to a court spiritual, and shall be definitively determined before a spiritual judge, and doth pass into a judgement, and shall not be suspended by an appeal; and after, if upon the same thing a question is moved before a temporal judge between the same parties, and it be proved by witness or instruments, such an exception is not to be admitted in a temporal court. The answer. When any one case is debated before judges spiritual or temporal (as above appeareth upon the case of laying violent hands on a clerk) it is thought, that notwithstanding the spiritual judgement, the king's court shall discuss the same matter as the party shall think expedient for himself.

(1) *Fuerit sententialiter terminatum, et transferit in rem judicatam,* Art Cleri. 3. Jac. &c.] The like article was preferred 3 Jac. and answered and resolved by all the judges of England, which you may reade there, and need not here to be rehearsed.

(2) *Diversis rationibus.*] For the spirituall judges proceedings are for the correction of the spirituall inner man, and, *pro salute animæ*, to injoyne him penance; and the judges of the common law proceed to give damages and recompence for the wrong and injury done: as if one lay violent hands of a clerke, the spirituall judge, *pro salute animæ*, shall injoyne him penance, and the clerke may have his action of battery, and recover damages for the injury done to him; and so in the case of usury, and the like: so as this act saith well, that *eadem causa diversis rationibus coram iudicibus ecclesiasticis et secularibus ventilatur*; and therefore this article of the clergy was deservedly rejected.

CAP. VII.

ITEM, *littera regia ordinariis dirigitur, qui aliquos suos subditos excommunicationis vinculo innodaverunt, quod eos absolvant infra certum diem; alioquin quod compareant responsuri quare eos excommunicaverunt. Responsio: rex * decernit, quod talis littera nunquam in posterum exire permittatur, nisi in casu quo possit inveniri, lædi per excommunicationem regiam libertatem.*

* [623]

ALSO the king's letter directed unto ordinaries, that have wrapped those that be in subjection unto them in the sentence of excommunication, that they should assail them by a certain day, or else that they do appear, and shew wherefore they have excommunicated them. The answer. The king decreeth, that hereafter no such letters shall be suffered to go forth, but in case where it is found that the king's liberty is prejudiced by the excommunication.

(5 El. c. 23. Regist. 65.)

Here was a mistaking in the article of the clergy: for never was any writ of the king here called *littera regis*, granted in case of excommunication, but in certaine cases, as, when a man is justly excommunicated, and taken by force of the kings writ *de excommunicatione cap.* if the bishop, upon the kings writ *de cautione admittenda*, &c. doe not deliver him, then shall a writ out of the chancery goe to the sherife, upon the refusall of the bishop to deliver him; or if the excommunication be unjust, that is, if the party be excommunicated for a matter which belongs not to ecclesiasticall consueance, and taken by force of the kings writ, then the party grieved shall have a writ out of the chancery to the sherife, to deliver him out of prison. And this appeareth by our ancient books written before this act, and by ancient records and book-cases in all succession of ages ever since; and in both the cases abovesaid, *regia libertas læsa fuit*, and thereupon the subject had reliefe by the kings writ; and therefore the answer to this article was very pertinent, *Nisi in casu quo possit inveniri, lædi per excommunicationem regiam libertatem.* And

3 R 4

Regist. 65, 66,
67, 70. Bract.
lib. 5. fol. 408,
409, 427, 443,
Flet. lib. 6. c. 43.
5 E. 3. 8. 8 E. 3.
9. 14 H. 4. 14.
15. 3 H. 4. 4.

Doctor & Stud.
lib. 2. cap. 32.
Vet. N.B. 33.
35. F.N.B. 62.
&c. Dorf. claus.
21 R. 2. m. 10.
Hill. 22 E. 1.
apud Sandw. co-
ram rege, rot. 2.
William de Va-
lences case.

the contempt of the bishop in those cases is the greater, for that *brevé regis de excommunicato cap. de gratia regis procedit*. And so it is if a man be excommunicated, and offer to obey and performe the sentence, and the bishop refuseth to accept it, and to asloile him, he shall have a writ to the bishop, requiring him, upon performance of the sentence, to asloile him, &c. and the reason thereof is, for that by the excommunication, the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remaine excommunicate. And also the party grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to ecclesiasticall consufance. Also the bishop in those cases may be indited at the suit of the king, as by many notable records may appeare: Mich. 7 E. 1. *coram rege*, Rot. 33. Robertus Sprot, Hill. 7 E. 1. *coram rege*, Rot. 8. Magister R. de Petchford, Pasch' 32 E. 1. *coram rege*, Rot. 33. Walterus de Wilton, Hill. 35 E. 1. *coram rege*, Rot. 52. Gloc' Prior de Gloucesters case, Mich. 19 E. 2. *coram rege*, Rot. 53. Linc' Philip Whites case, Trin. 20 E. 3. *coram rege*, Rot. 46, 289. Fresles case.

23 E. 3. 97.
14 H. 4. 14.
3 H. 4. 4. 22 E.
4. 20. b. 9 H. 7.
22. Fitz. N.B.
6. f.
5 El. cap. 23.

And it is to be observed, that at the common law a certificate of the bishop, whereupon a *significavit*, that is, a writ *de excommunicato capiendo* was to be granted, ought to expresse the cause, and the sute against him specially in the certificate.

See more the statute of 5 El. cap. 23. concerning the awarding and returning the writ *de excommunicato capiendo*.

See the first part of the Institutes, sect. 201. concerning this matter.

C A P. VIII.

ITEM, *barones de scaccario domini regis, vendicantes sibi ex privilegio (1), quod non debent extra illum locum conquarenti cuicunque respondere, extendunt illud privilegium ad clericos commorantes ibidem, vocatos ad ordines, seu ad residentiam; et diocesani inbibeant, ne ali-*
[624] *quo modo aliquave ex causa, dum sint in scaccario, et in servitio domini regis, trahant ad iudicium quovismodo. Responsio: Placet domino regi, ut clerici suis obsequiis intendentes, si delinquant (2) per ordinarios (ut ceteri) corrigantur: sed tempore quo occupantur circa scaccarium, ad residentiam (3) in suis faciendam ecclesiis non teneantur. Hic additur de novo, per concilium domini regis (4). Rex et antecessores sui, à tempore*

ALSO barons of the king's exchequer claiming by their privilege, that they ought to make answer to no complainant out of the same place, extend the same privilege unto clerks abiding there, called to orders or unto residence, and inhibit ordinaries that by no means, or for any cause, so long as they be in the exchequer, or in the king's service, they shall not call them to judgement. The answer. It pleaseth our lord the king, that such clerks as attend in his service, if they offend, shall be correct by their ordinaries, like as other; but so long as they are occupied about the exchequer, they shall not be bound to keep residence in their churches. This is added of new by the king's council.
The

tempore cujus contrarii memoria non existit, usi sunt, quod clerici suis immorantes obsequiis, dum obsequiis illis intenderint, ad residentiam in suis beneficiis faciendam minime compellantur; nec debet dici tendere in præjudicium ecclesiasticæ libertatis, quod pro rege et republica necessarium invenitur (5).

The king and his ancestors since time out of mind have used, that clerks, which are employed in his service, during such time as they are in service, shall not be compelled to keep residence at their benefices. And such things as be thought necessary for the king and the commonwealth, ought not to be said to be prejudicial to the liberty of the church.

(Regist. 58.)

(1) *De privilegio, &c.*] The court of the exchequer may grant a prohibition to the ordinary, for any that ought to have the privilege of the exchequer, where the court may give the party remedy, or where a sute dependeth in the court of exchequer for the same cause, or where the kings service, which is the cause of the privilege, is hindered by the suit before the ordinary: as for non-residence, &c. during that time that he gave his necessary attendance in the exchequer for the kings service.

(2) *Si delinquant.*] This extendeth onely *ad delicta, i. crimina*, whereof the ecclesiasticall court hath consuſance, as heresie, adultery, and the like, which the ordinary may correct; and not unto civill actions.

(3) *Ad residentiam.*] There is an ancient writ, called *de non residentia clerici regis*, the words of which writ be, *Cum clerici nostri ad faciend' in beneficiis suis residentiam personalem, dum in nostris immorantur obsequiis compelli, aut alias super hoc molestari, seu inquietari non debeant: nosque ac progenitores nostri quondam reges Angliæ, hujusmodi libertate et privilegio pro clericis nostris à tempore quo non extat memoria semper hæcenus usi sumus: vobis mandamus, quod dilectum clericum nostrum A. parsonam ecclesiæ de B. vestræ diocesis, qui in cancellaria nostra, nostris jugiter intendit obsequiis, ad personalem residentiam in beneficio suo prædict' faciendam, dum in eisdem obsequiis nostris immoretur, nullatenus compellatis. Et sequestrum si quod in fructibus, aut aliis bonis ecclesiæ suæ prædictæ ea occasione per vos, aut vestros fuerit appositum, sine dilatione relaxari faciatis. Teste, &c.* Regist. 58. b.
F N.B. 44. b.

(4) *Per concilium domini regis.*] Here *concilium domini regis* is taken for *commune concilium regni*, as it is termed in originall writs, and in other legall records, and so it is taken in other acts of parliament, and in the preamble of this act also, where it is said, *Ac nuper in parlamento nostro apud Lincoln', &c. coram concilio nostro, &c.*

This branch is generall (and not limited, as the former is, to the privilege of the exchequer) but extendeth to any other service of the king for the common-wealth: as if hee be employed as an embassadour into any forraine nation, or the like service of the king, which is *pro republica*, for the common-wealth, as hereafter it is said, which ever must be preferred before the private.

(5) *Nec debet dici tendere in præjudicium ecclesiasticæ libertatis, quod pro rege et republica necessarium invenitur.*] The clergy in this parliament inveighing vehemently against this answer, and that it

tended

Regist. 38. b.

tended to the breach of the ecclesiasticall liberty, which was granted to them by *Magna Charta*, and often confirmed by other acts of parliament, *quod ecclesia Anglicana libera sit, &c.* To which it was answered, that the words subsequent explained those words, *et habeat omnia jura sua et libertates suas illæsas*; so as the clergy cannot claime any right, but *jus suum*, nor any liberty, but *libertates suas*: and the point here in question, *viz.* to proceed against a clerke for non residence, whiles hee was in the kings service for the commonwealth, was neither *jus suum*, nor *libertas sua*, but *libertas regis*: and therefore the parliament thought it fit to declare, that the king and his ancessors had used this liberty or prerogative time out of mind. And where it was said, that this tended in *præjudicium ecclesiasticæ libertatis*, the parliament thereunto answered (which is worthy to be written in letters of gold) *nec debet dici in præjudicium ecclesiasticæ libertatis, quod pro rege et republica necessarium invenitur.*

Regularly personall residence is required of ecclesiasticall persons upon their cures; and to that end, by the common law, if hee that hath a benefice with cure, be chosen to an office as to an office of bailiffe, or bedle, or the like secular office, he may have the kings writ, *quod non eligatur in officium, &c. quia non est consonum, quod is, qui pro salubri statu animarum elemosinis, et aliis piis operibus, infra, &c. manuteneendis et sustentandis continue deseruit, extra &c. in secularibus negotiis compellatur, vobis præcipimus, quod districtioni et compulsioni, si quas &c. eidem &c. ad officium baliivi, bedelli, &c. in manerio, &c. assumend' fueritis, omnino supersedeatis, et eas sine dilatione relaxetis, et denarios, si quos per amerciamenta, vel alio modo ex causa præd' ab eo levaveritis, eidem &c. restitui faciatis immediate, sub periculo quod incumbit. Teste, &c.*

2 Tim. 2. ver. 4.

34 H. 6. 40. a.

30 H. 6. fo. 3. a.

And this writ of ancient time was granted at the petition of the clergy, and grounded upon holy writ, *Nemo militans Deo implicat se negotiis secularibus, ut ei placeat cui se probavit.* And the opinion of Sir John Prisot, chiefe justice of the common pleas, is notable; to those lawes which holy church hath out of the scripture, we ought to yield credit; for that (saith he) is the common law, upon which all lawes are founded: and the intendment of the common law is, that a parson, &c. is resident upon his cure; for in an action of debt brought against J. S. *rectorem de D.* the defendant pleaded, that he was demurrant, and conversant at B. in another county: and the rule of the booke is, that seeing the defendant denied not that he was rector of the church of D. he shall be deemed by law to be demurrant and conversant there for the cure of soules; and therefore the plea was over-ruled.

We could not over-passe an ancient and an excellent record concerning non-residence, in the 48 yeare of king Henry the third, for it is worthy of rehearfall for many purposes: at that time one Peter Egnecblanke a stranger, borne in Savoy, was bishop of Hereford: this bishop then was, and long before had been a non resident, an unfaithfull steward, and altogether carelesse of his pastoral charge: the king travelling (for the defence and safety of the Marches) came to the citie of Hereford, where finding the bishop absent, the people neither informed nor reformed *per verbum salutis, et virgam correctionis*, divine service neglected, and all things out of order, as by the writ following appeareth, which

which we hold worthy to be rehearsed *de verbo in verbum*, as it is of record.

Rex episcopo Hereford salutem, Pastores gregibus præponuntur, ut, diei noctisque vigilias exercendo, oves famelicas in fertilitatis pascua introducant: errantes vero per verbum salutis, & virgam correctionis in unius ovilis conservare studeant indissolubilem unitatem: sed sunt nonnulli qui hanc doctrinam damnabiliter contempnentes, & sua ab aliis pecora distinguere nescientes, lac & lanam tollunt, qualiter dominicus grex alatur non curantes, temporalia rapiunt, & quis in parochia fame pereat, aut periclitetur in moribus, non attendunt; qui non pastores, sed mercenarii potius dici promerentur: hoc siquidem, dum hiis diebus ad disponendum de regni nostri præsidii in partes Marchiæ nos transferremus, in ecclesia vestra Hereff. (dolenter referimus) nos invenisse quam adeo invenimus pastoris solatio destitutam, ut ne dum episcopum, sed nec officialem haberet, vicarium, aut decanum, qui quicquam spiritualitatis exercere possit in eadem. Sed ecclesia ipsa, quæ olim deliciis affluere consuevit, & canonicis qui ibidem nocturnis et diurnis officiis vacare, & opera charitatis exercere deberent, eam deferentibus & longe degentibus in remotis, sola jocunditatis exuta cecidit in ferram, viduitatis suæ detrimenta deplorans, nec est qui consoletur eam ex omnibus caris ejus: sane, dum hæc vidimus & consideramus diligenter, pietatis aculeus viscera nostra commovit, & compassionis gladius intima cordis nostri acrius vulneravit, ut tantam ecclesiæ matris nostræ injuriam ulterius dissimulare non possimus, nec pertransire incorrectam. Quapropter vobis mandamus firmiter injungentes, quatenus ad ecclesiam vestram prædictam, occasionibus quibuscunque postpositis, cum ea qua poteritis celeritate vos transferre curetis, commissum vobis in eadem cura pastoralis officium personaliter executur' &c. Alioqui scire vos volumus pro constanti, quod si istuc facere non curaveritis, bona temporalia, & omnia quæ ad baronium ipsius ecclesiæ pertinent, quæ donatione constat eidem fuisse collata, & quæ hætenus colligi, & salvo custodiri præcepimus in commodum & utilitatem ipsius ecclesiæ convertenda, cessante jam causa in manu nostra totaliter capiemus, nec ulterius sustinebimus, quod temporalia metat, qui spiritualia ad quæ ex officii sui debito tenetur, irreverenter subtrahere non formidat, aut quod emolumenta percipiat, qui incumbencia ejusdem onera subire recusat. Test' R. apud Hereff. primo die Junii anno regni sui xlviii.

By this writ the king telleth the bishop what his pastorall office and duty was, rehearseth the damnable and damned events of non-residency, commandeth him to be personally resident, and representeth to him the danger, if he doth it not. And this writ, commanding residence, ought to have been put into the Register of writs, rather then the writ *de non residentia clerici regis: hoc non omitendum, illud faciendum.*

The Englishman hath ever been desirous to be taught and directed in the way of his salvation; and therefore hath often complained in * parliament against non residents, unlearned pastors, and pluralities, which you may reade in the fountaines themselves.

After that Thomas Wolsey in the seventh year of Henry the eight was made cardinall, and grew into the height of his authority and favour with the king, he hated both parliaments, and the common lawes (the principall meanes to keep greatnesse in order, and due subjection) as it is contained in his inditement, which he confessed of record, that hee intended (that I may use the very words

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* Rot. parl.
35 E. 1. *testatute*
de Carille.
18 E. 3. nu. 32.
Rot. parl. 3 R. 2.
nu. 38. 3 R. 2.
stat. 2. cap. 2.
7 R. 2. nu. 35.
17 R. 2. nu. 43.
1 H. 4. nu. 50.
2 H. 4. nu. 26.
6 H. 4. nu. 48.
7 H. 4. nu. 114.
11 H. 4. nu. 70.
3 H. 6. nu. 38.
4 H. 6. nu. 31.
of
&c.

Mish. 21 H. 8.
sorum Rego.

of the record) *Antiquissimas Angliæ leges penitus subvertere, et emendare, universumq; hoc regnum Angliæ, et ejusdem regni populum legibus imperialibus vulgo dictis legibus civilibus, et earundem legum canonibus imperpetuum subjugare et subducere, &c.* And for execution of his intended plot, he was the meane that but one parliament was holden in fourteen yeares, viz. from the seventh yeare, till the one and twentieth yeare of Henry the eight, and that one was principally holden for the attainder by parliament of Edward the good duke of Buckingham, whom he hated, and the confiscation of all that he had. Now the cardinall, being a great protector of non-residents, was no sooner attained by that law (which he sought to alter) but at the parliament holden in 21 H. 8. a law was made against non-residence, which was excellent for that time, but now had need of some alterations and additions.

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27 H. 8. cap. 13.
Vid. 33 H. 8.
cap. 28.

C A P. IX.

ITEM, *ministri domini regis, ut vicecomites, et alii, ingrediuntur feoda ecclesiæ (1) ad faciendum districtiones, et aliquando capiunt animalia rectorum (2) in via regia, quando non habent nisi terram pertinentem ad ecclesiam. Responso: Placet domino regi quod de cætero districtiones fiant hujusmodi, nec in via regia, nec in feodis, quibus olim (4) ecclesiæ sunt dotatae (3), vult tamen districtiones fieri in possessionibus de novo à personis ecclesiasticis acquisitis.*

ALSO the king's officers, as sheriffs and other, do enter into the fees of the church to take distresses, and sometime they take the parson's beasts in the king's highway, where they have nothing but the land belonging to the church. The answer. The king's pleasure is, that from henceforth such distresses shall neither be taken in the king's highway, nor in the fees wherewith churches in times past have been indowed; nevertheless he willet distresses to be taken in possessions of the church newly purchased by ecclesiastical persons.

(52 H. 3. c. 15. Regist. 98. 183.)

Marlebridge, ca.
15.

Reg. 187, 188.
F.N.B. 173. c. f.

(1) *Ingridiuntur feoda ecclesiæ.*] See the exposition upon the statute of Marlebridge: this is to be added, that the statute of Marlebridge was construed to extend onely to lay men, and this statute to men of the church: and this appeareth by the Register; for if a lay man bring an action upon the statute for distraining in the kings high-way, he reciteth the statute of Marlebridge: and if a parson bring an action for distraining in the high-way, he groundeth it upon this statute.

(2) *Rectorum.*] Here parsons be named but for example; for this law extended to abbots, priors, and the like; for afterwards the words be *personæ ecclesiasticæ*: but this law bindeth not the king, when he is party, for any debt, or duty due unto him, because the distresse or other proceffe for the king is not expressly named in the act, but *districtiones* generally: and this appeareth by a book-case: a prior brought a bill of trespass against J. for entering into his

27 Aff. p. 66.

his sanctuary, that is, within the circuit of the scite of his priorie, and tooke away his beasts: J. said that he was sheriffe, and that the prior lost issues in the court of common pleas, and a writ issued to him to levie the issues, and that hee entred into the sanctuary, &c. because he could not find a distresse without; whereupon the plaintife demurred, and judgement was given against the plaintife, which proveth, that the sheriffe in that case could not have returned upon the processe to him directed, *Clericus beneficiatus nullum habens laicum feudum.*

(3) *Nec in feodis quibus olim ecclesiæ sunt dotatae.*] Here *dotata* is taken in a large sense; for here the fees that they have *ratione fundationis*, or *ratione dotationis* are included; and here is also to be noted, that the possessions of the church are the indowment of the church, and they accounted as tenants in dower, as in another place hath been observed.

(4) *Olim.*] This word is well expounded afterwards in this act, to be those that are not *de novo acquisita*.

Concerning takes, tenths, and fifteenes granted by parliament to the king, the possessions of ecclesiasticall persons, which they acquired since 20 E. 1. either by purchase or act in law, as by others; &c. were chargeable thereunto: but those which they had at that time were not charged therewith; and the reason thereof was this, the pope (after the example of the high priest amongst the Jewes, who had of the Levites *decimam partem decimæ*) claimed by pretext thereof a yearly tenth part of the value of all ecclesiasticall livings: this portion or tribute was by ordinance yeilded to the pope in 20 E. 1. and a valuation then made of the ecclesiasticall livings within this realme, to the end the pope might know, and be answered of that yearly revenue, so as the ecclesiasticall livings chargeable with that tenth (which was called spirituall) to the pope, were not chargeable with the temporall tenths or fifteenes granted to the king in parliament, lest they should be doubly charged, but their possessions acquired after that taxation were liable to the temporall tenths or fifteenes, because they were not charged to the other; and so it was declared by act of parliament in 18 E. 3. which never was printed; so as the tenths of ecclesiasticall livings were not yeilded to the pope *de jure*, after the example of the high priest amongst the Jewes; for then hee should have had the tenths of all ecclesiasticall livings whensoever they were acquired; but he contented himselfe with what he had got, and never claimed more: and that he might the better keep and enjoy that which he had got, the popes did often after grant the same for certaine termes to divers of the kings of England, as by our histories appeare. And albeit these yearly tenths are perpetually annexed to the crown of England by act of parliament yet hereby the student shall better understand the bookes of law that treat hereof.

17 E. 3. 44. b.
27 E. 3. 28. b.
11 H. 4. 35.
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Numeri, ca. 28.
ver. 26.

Rot. parl. 15 E.
3. nu. 44. never
printed.

26 H. 3. ca. 3.
1 Eliz. ca. 11.

CAP. X.

ITEM, quodocunque aliqui confugientes ad ecclesiam abjurant terram (1), secundum regni consuetudinem, et prosequuntur laici eos, vel inimici eorum, et à publica strata abstrahuntur, et suspenduntur, vel statim decapitantur (2), et dum sint in ecclesia custodiuntur per armatos infra cœmeterium, quandoque infra ecclesiam ita arcte, quod non possunt exire locum sacrum causa superflui ponderis deponendi, nec permittitur eis necessaria ad victus ministrari. Responsio: Qui terram abjurerint, dum sint in strata publica, sint in pace domini regis, nec debent ab aliquo molestari: et dum sint in ecclesia, custodes eorum non debent morari infra cœmeterium, nisi necessitas, vel evasionis periculum hoc requirat: nec ardentur confugere, dum sint in ecclesia, quin possint habere vitæ necessaria (3): et exire libere pro obsecro pondere deponendo. Placet etiam domino regi, ut latrones vel appellatores (5), quodocunque voluerint, possint sacerdotibus sua facinora confiteri: sed caveant confessores, ne erronee hujusmodi appellatores informant (4).

AL SO where some flying unto the church, abjure the realm, according to the custom of the realm, and lay-men or their enemies do pursue them, and pluck them from the king's highway, and they are hanged or headed; and whilst they be in the church, are kept in the church-yard with armed men, and sometime in the church, so straitly, that they cannot depart from the hallowed ground to empty their belly, and cannot be suffered to have necessaries brought unto them for their living. The answer. They that abjure the realm, so long as they be in the common way, shall be in the king's peace, nor ought to be disturbed of any man; and when they be in the church, their keepers ought not to abide in the church-yard, except necessity or peril of escape do require so. And so long as they be in the church, they shall not be compelled to flee away, but they shall have necessaries for their living, and may go forth to empty their belly. And the king's pleasure is, that thieves or appellors (whensoever they will) may confess their offences unto priests; but let the confessors beware that they do not erroneously inform such appellors.

(1 Jac. 1. c. 25. 21 Jac. 1. c. 28.)

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Bract. lib. 2. fo. 135. &c. Brit. fol. 24. &c. Flet. li. 1. c. 29. Stamf. pl. coro. fo. 116. f. &c. 21 Jacobi Regis, cap.

(1) *Abjurant regnum.*] Concerning abjuration you may plentifully read in our ancient authors, and other bookes of the lawes, and specially in Stamford pl. coron. fol. 116. &c. wherein we are the more briefe, because it is enacted by the statute of 21 Jac. regis, that no sanctuary, or priviledge of sanctuary, after that statute be admitted or allowed in any case; and if the offender be barred of the priviledge of sanctuary to be allowed to him, then can hee not flee to any church, as to a sanctuary, for the tuition of his life, and consequently abjuration is taken away.

(2) *Decapitantur.*] This was mistaken in the petition: for no man can be beheaded but for treason; and no man could abjure for

for treason, because the coroner had no power to take any confession for treason, albeit the coroner had a speciall commission from the king to doe it.

See 1 Jacobi regis, cap. 25.

(3) *Quin possint habere vitæ necessaria.*] This is thus to be understood, that he shall have *necessaria vitæ* so long as he behaves himselfe according to the law, and the priviledge of the place; but if hee had continued 40 dayes, and would not abjure, then *vitæ necessaria* shall be denied unto him, and they should be punished that ministred the same unto him.

(4) *Placet etiam domino regi, ut latrones, vel appellatores, quando-cunque voluerint, possint sacerdotibus sua facinora confiteri, sed caveant confessores, ne erronee hujusmodi appellatores informant.*

(5) *Latrones vel appellatores.*] This branch extendeth onely to theeves and approvers indited of felony, but extended not to high treasons: for if high treason be discovered to the confessor, he ought to discover it, for the danger that thereupon dependeth to the king and the whole realme; therefore this branch declareth the common law, that the priviledge of confession extendeth onely to felonies: and albeit, if a man indited of felony becometh an approver, he is sworne to discover all felonies and treasons, yet is hee not in degree of an approver in law, but onely of the offence whereof he is indited; and for the rest, it is for the benefit of the king, to move him to mercy: so as this branch beginneth with theeves, extendeth onely to approvers of theevery or felony, and not to appeales of treason; for by the common law, a man indited of high treason could not have the benefit of clergy (as it was holden in the kings time, when this act was made) nor any clergy-man priviledge of confession to conceale high treason: and so was it resolved in * 7 Hen. 5. whereupon frier John Randolph the queene dowagers confessor, accused her of treason, for compassing of the death of the king: and so was it resolved in the case of Henry Garnet, superiour of the jesuites in England, who would have shadowed his treason under the priviledge of confession, although in deed he was not onely consenting, but abetting the principall conspirators of the powder-treason, as by the record of his attainder appeareth; and albeit this act extendeth to felonies onely, as hath been said, yet the caveat given to the confessors is observable, *ne erronee informant.*

Bract. li. 2. fo. 135. &c. Bnit. fol. 24. 25. Flet. li. 1. c. 29. 3 E. 3. coron. 313. Stamp. ubi supra.

12 E. 4. 10. b. 19 E. 2. cor. 387. 6 H. 6. coro. 231. 19 H. 6. 47. See W. 2. ca. 42. § Si Abbates, &c. li. 2. fo. 46. Levesque de Cant' case, &c. 20 E. 2. coro. pl. 283. 19 H. 6. 47.

* Rot. Parl. anns 7 H. 5. nu. 13. Hill. 3 Jac.

CAP. XI.

ITEM petitur, quod dominus rex, et regni magnates non onerent domos religiosas, vel ecclesiasticas personas pro corodiis, pensionibus (1), vel perhencionibus (2) faciendis in domibus religiosis, et aliis locis ecclesiasticis, carellis et equis sibi mittendis, cum per hoc prædictæ domus depauperentur cul-

tisque

ALSO it is desired that our lord the king, and the great men of the realm do not charge religious houses, or spiritual persons, for corodies, pensions, or sojourning in religious houses, and other places of the church, or with taking up horse or carts, whereby such houses are impoverished, and God's service diminished,

tusque divinus in hac parte diminuat, et propter hujusmodi onera compelluntur sæpissime presbyteri, et alii ministri ecclesiastici divinis officiis deputati à locis recedere supradicti. Responsio: Placet domino regi, quod super contentis in petitione, de cætero indubite non onerentur. Et si per magnates, aut alios contra fiat, habeant inde remedium juxta formam statutorum (3) tempore dom. E. regis patris domini regis nunc editorum: et fiat consimile remedium de corodiis, et pensionibus (4) per coercionem exactis, de quibus non fit mentio in statutis.

nished, and, by reason of such charges, priests, and other ministers of the church deputed unto divine service, are oftentimes compelled to depart from the places aforesaid. The answer. The king's pleasure is, that upon the contents in their petition, from henceforth they shall not be unduly charged. And if the contrary be done by great men or other, they shall have remedy after the form of the statutes made in the time of king Edward, father to the king that now is. And like remedy shall be done for corodies and pensions exacted by compulsion, whereof no mention is made in the statutes.

(3 Ed. 1. c. 1.)

(1) *Pro corodiis, et pensionibus.*] See hereafter in the end of this chapter, to whom, and in what cases corodies and pensions be due.

(2) *Perbendinationibus.*] See hereof W. 1. cap. 1.

Rast. pl. fo. 373.

(3) *Juxta formam statutorum.*] That is to say, of W. 1. anno 3 E. 1. cap. 1.

Regist. fol.

F.N.B. 230. b.

14 H. 6. 11.

2 E. 2. cui in vi-

ta 18. 6 E. 2.

ibid. 25.

Bract. li. 3. fo.

221. 14 E. 3. co-

rody 5. 15 E. 3.

ibid. 4. 11 aff.

22. 24 E. 3. f. 33.

38 aff. 22. 44 E.

3. 24. 50 aff. 6.

10 H. 4. 33.

14 H. 6. 11.

39 H. 6. 28.

1 E. 4. 10.

8 H. 7. 12.

F.N.B. 231.

Vid. rot. clauf.

in dorf. 8 H. 4.

m. 13. & 9 H. 4.

(4) *Consimile remedium de corodiis et pensionibus.*] Albeit corodium is derived à con et rodere, i. simul comedere; yet to a corody belong not onely victus, but vestitus, et alia vitæ necessaria, which is called sustentatio congrua, as much as a monke of the same house hath; and a pension is a yearly annuity to be granted to one of the kings chapleines. The king shall have a corody for his vadelet, and a pension for his chapleyn, out of all the religious and ecclesiasticall houses of his foundation (unlesse the tenure be in frankalmoigne) but by reason of dotation, if he be not founder, he shall have none, unlesse it be by speciall grant. A common person shall have no corody, nor pension, &c. though he be founder, unlesse it be by speciall grant. The abbot, &c. shall not be charged with a new pension, though the chapleyn dye, during the life of the king; but if the abbot, &c. dye, his successor shall be charged, ratione creationis with a pension. If the vadelet dye, another shall have the corody during the kings life; but if the abbot, &c. dye, no new corody during the life of the former vadelet.

m. 13. & 9 H. 4. m. 33, 34. penc' coram rege, Mich. 32. E. 1. Northampton.

C A P. XII.

ITEM, si aliqui de tenura domini regis vocantur coram ordinariis, extra parochiam in qua degunt, si propter suam contumaciam manifestam excommunicentur, ac post quadraginta dies pro eorum captione scribatur, prætendunt se privilegiatos, quod extra villam seu parochiam suam non debent vocari, et sic denegatur breve regium pro captione eorundem. * Responso: Nunquam fuit negatum, nec negabitur in futurum.

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ALSO if any of the king's tenure be called before their ordinaries out of the parish where they continue, if they be excommunicate for their manifest contumacy, and after forty days a writ goeth out to take them, they pretend their privilege, that they ought not to be cited out of the town and parish where their dwelling is; and so the king's writ that went out for to take them is denied. The answer. It was never yet denied, nor shall be hereafter.

The writ *de excommunicato capiendo*, commonly called a *significavit*, was never denied; for this cause, that hee that held of the king had such a privilege, that they should not be called out of the towne or parish where they lived; and therefore the answer (which must ever be conforme to the petition) ought of necessity to be taken, that for that cause the king's writ was never, nor should be denied.

But for the better understanding hereof, at the parliament holden at Clarendon, in the eleventh yeare of Henry the second, *Facta est recognitio, seu recordatio cujusdam partis consuetudinum antecessorum regis, viz. Henrici (primi) avi sui, quæ observari debebant in regno, et ab omnibus teneri propter dissensiones et discordias sæpe emergentes inter clericum et justiciarios Domini regis, et magnatum regni.* Amongst the rest, this was agnized and declared in these words: *Nullus qui de rege tenet in capite, nec aliquis dominicorum ministrorum ejus excommunicetur, nec alicujus eorum terræ sub interdicto ponantur, nisi prius dominus rex, si in regno fuerit, conveniatur, vel justiciarius ejus, si fuerit extra regnum, ut rectum de eo faciat, ut quod pertinebat ad regis curiam, ibi terminetur, et de eo quod spectat ad curiam ecclesiasticam ad eandem mittatur, et ibidem terminetur.* And the reason of this law was, for that the tenures by grand serjeantie, and knights service *in capite* were for the honour and defence of the realme; and concerning those that served the king in his household, their continuall service and attendance upon the royall person of the king was necessary.

Of this law the clergy here complained not, and other then this concerning tenure, &c. in the petition mentioned, we remember not any; so as we may conclude this point, that this writ *de excommunicato capiendo* (as hath been said) *procedit de gratia regis.*

8 Kal. Febr. anno 11 H. 2. apud Clarendon, commonly called Assisa de Clarendon, Bract. li. 3. fol. 136.
See cap. 15.

Vid. ca. 7. before Rot. claus. in dorf. 17 R. 2. m. 10.

C A P. XIII.

ITEM petitur quod personæ ecclesiasticæ, quas dominus rex ad beneficia præsentet ecclesiastica, si episcopus eas non admittat, ut puta propter defectum scientiæ, vel aliam causam rationabilem, non subeant examinationem laicarum personarum in casibus antedictis, prout his temporibus attentatur de facto, contra canonicas sanctiones: sed adeant iudicem ecclesiasticum, ad quem de jure pertinet pro remedio, prout justum fuerit, consequendo. Responsio: De idoneitate personæ (1) præsentatæ ad beneficium ecclesiasticum pertinet examinatio ad iudicem ecclesiasticum: et ita est hactenus usitatum (2), et fiat in futurum.

ALSO it is desired that spiritual persons, whom our lord the king doth present unto benefices of the church (if the bishop will not admit them either for lack of learning, or for other cause reasonable) may not be under the examination of lay persons in the cases aforesaid, as it is now attempted, contrary to the decrees canonical, but that they may sue unto a spiritual judge for remedy, as right shall require. The answer. Of the ability of a parson presented unto a benefice of the church the examination belongeth to a spiritual judge; and so it hath been used heretofore, and shall be hereafter.

(4 Mod. 135. Regist. 53.)

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 (1) *De idoneitate personæ.*] It is required by law, that the person presented be *idonea persona*; for so be the words of the kings writ, *præsentare idoneam personam*. And this *idoneitas* consisteth in divers exceptions against persons presented: first, concerning the person, as bastardy, villenage, outlawry, excommunication, a layman, under age, and the like: secondly, concerning his conversation, as if he be *criminosus*, &c. Thirdly, concerning his inability to discharge his pastorall duty, as if hee be unlearned, and not able to feed his flocke with spirituall food, &c. And the examination of the ability and sufficiency of the person presented belongs to the bishop, who is the ecclesiasticall judge; and in this examination he is a judge, and not a minister, and may and ought to refuse the person presented, if he be not *idonea persona*. And if the cause of refusall be for default of learning, or that he is an heretick, schismaticke, or the like, belonging to the knowledge of ecclesiasticall law, there he must give notice thereof to the patron; but if the cause be temporall, as a felon, or homicide, or other temporall crime; or if the disability grow by any act of parliament, or other temporall law, there no notice ought to be given, unlesse notice be prescribed to be given thereby. But in a *quare impedit* brought against the bishop, for refusall of the clerke, he must shew the cause of his refusall specially and directly (for whether the cause thereof be spirituall or temporall, the examination of the bishop concludes not the plaintife) to the intent the court, being judges of the principall cause, may consult with learned men in that profession, and resolve whether the cause be just or no; or the party may deny the same, and then the court shall write to the metropolitane to certifie the same; or if the cause

Regist. 53. b.

38 E. 3. 2.

29 E. 3. 44.

5 R. 2. tryall 54.

11 H. 4.

34 H. 6. 40. per

Prifot, 5 H. 7. 19.

11 H. 7. 7. 37.

15 H. 7. 7.

9 El. Dyer, 154.

13 El. Dyer, 332.

Ti. 5. fol. 57.

Specuts case.

bee temporall, and sufficient in law (which the court must decide) the same may be traversed, and an issue thereupon joyned, and tried by the country. And yet in some cases, notwithstanding this statute, *idonietas personæ* shall be tried by the country, or else there should be a failer of justice (which the law will never suffer) as if the inability or insufficiency be alledged in a man that is dead, this case is out of this statute: for the bishop cannot examine him, and the words of this act be, *de idonietate personæ præsentatæ ad beneficium eccles. pertinet examinatio*, &c. And consequently, though the matter be spirituall, yet shall it be tried by a jury, and the court, being assisted by learned men in that profession, may instruct the jury as well of the ecclesiasticall law in that case, as they usually doe of the common law.

(2) *Et ita est hactenus usitatum.*] So as this act is a declaration of the common law and custome of the realme.

CAP. XIV.

ITEM, *si vacet aliqua dignitas, ubi electio est facienda, petitur quod electores libere possint eligere, absque incussione timoris à quacunque potestate seculari: et quod cessent preces, et oppressiones in hac parte. Responsio: Fiant libere, juxta formam statutorum et ordinationum.*

ALSO if any dignity be vacant, where election is to be made, it is moved that the electors may freely make their election without fear of any power temporal, and that all prayers and oppressions shall in this behalf cease. The answer. They shall be made free according to the form of statutes and ordinances.

(3 E. 1. c. 5.)

The clergy either remembred not the statute of W. 1. or W. 1. cap. 5. if they did, they doubted whether it extended to ecclesiasticall elections, although without question it did, and so it is declared by this act, and it is an excellent law, and worthy to be put in execution.

See more hereof before in the exposition upon the statute of W. 1.

CAP. XV.

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ITEM, *licet ille ricus coram seculari iudice judicari non debeat, nec aliquid contra ipsum fieri, per quod ad periculum mortis, vel ad mutilationem membrorum valeat perveniri: seculares tamen iudices clericos ad ecclesiam confugientes, et reatus suos forte confitentes*

MOREOVER, though a clerk ought not to be judged before a temporal judge, nor any thing may be done against him that concerneth life or member; nevertheless temporal judges cause that clerks fleeing unto the church, and peradventure

3 S 2

confessing

confistentes faciunt abjurare regnum, et eorum abjuraciones admittunt ex illa causa, quanquam eorum iudices super hiis non existant: sicque datur laicis indireccte potestas huiusmodi clericos cruciandi, si ipsos post huiusmodi abjuracionem in regno contigerit inveniri: super quo petunt prelati, et cler' tale remedium adhiberi, ut immunitas ecclesiæ, et personarum ecclesiasticarum conservetur illæsa. Responsio: Clericus ad ecclesiam confugiens (1) pro feloniam, pro immunitate ecclesiastica obtinenda, si asserit se esse clericum, regnum non compellatur abjurare, sed legi regni se reddens gaudebit ecclesiastica libertate, juxta laudabilem consuetudinem regni (2) hætenus usitatam.

confessing their offences, do abjure the realm, and for the same cause admit their abjuracions, although hereupon they cannot be their judges, and so power is wrongfully given to lay persons to put to death such clerks, if such persons chance to be found within the realm after their abjuracion; the prelates and clergy desire such remedy to be provided herein, that the immunity or privilege of the church and spiritual persons may be saved and unbroken. The answer. A clerk fleeing to the church for felony, to obtain the privilege of the church, if he affirm himself to be a clerk, he shall not be compelled to abjure the realm; but yielding himself to the law of the realm, shall enjoy the privilege of the church, according to the laudable custom of the realm heretofore used.

Customier de Norm. c. 83. (28 H. 8. c. 1. 1 Jac. 1. c. 25. 21 Jac. 1. c. 23.)

Here the claim of the clergy is generall, that *clericus coram seculari iudice judicari non debeat, nec aliquid contra ipsum fieri, per quod ad periculum mortis, vel mutilationem membrorum valeat perveniri*: let us see what priviledge the clergy had allowed unto them in criminall cases: first, let us observe what our ancient authors have holden in that case: secondly, what records of parliament, and other records have delivered to us: thirdly, what acts of parliament have established in these cases: fourthly, what have the judgements and resolutions been of judges in our bookes and reports. And lastly, from what root this priviledge of clergy sprang, to exempt them from the common justice of the realme.

Customier ubi supra.

Bracton saith, *Cum clericus cujuscunque ordinis vel dignitatis captus fuerit pro morte hominis, vel alio crimine, et imprisonatus, et de eo petatur curia christianitatis ab ordinario loci, &c. imprisonatus statim ei deliberetur, &c. donec à crimine sibi imposito se purgaverit competenter, vel in purgatione defecerit, propter quod debet degradari, &c. cum autem clericus sic de crimine convictus degradetur, non sequitur alia pœna pro uno delicto, vel pluribus, ante degradationem perpetratis.* Here three things are to be noted: first, that he beginneth with the greatest felony, that is, the death of man: secondly, that albeit he were found guilty, and could not purge himselfe before the ordinary, yet all that the ordinary could doe was to degrade him. Thirdly, that he could have no other punishment for that felony, or any other formerly done, but degradation.

Britton also speaketh only of felony: *Et si le clerk encoupe de felonie alledge clergie, et soit tiel treuve, et per ordinarie demand, si soit enquisse coment il est mesçu, et s'il soit nient mesçu, &c. soit arge tout quits,*

See the statute of 23 H. 8. cap. 11. & ca. 1. 1 E. 6. cap. 10, &c. Bract. lib. 3. fol. 123. b.

Brit. fol. 11. Stamf. pl. cor. 123. c. 8 E. 2. coron. 417. 17 E. 2. lib. 386 3 H. 7. 12.

guits, et sil soit meserue, si soient ses chateaux taxes, et ses terres prises in nrs. mains, et son cors deliv' al ordinarie.

According to Britton, when one of the clergy was indited of felony, &c. and the ordinary demanded him, yet to the end (saith the * record) *ut sciatur qualis deliberaretur ordinario*, an enquest was charged by the court to enquire, whether he were guilty, or no. And though hee was found guilty by this enquest of office, yet was he delivered to the ordinary. and his chattels seised, and his lands taken into the kings hands, as Britton saith.

Fleta saith, *Si criminaliter agatur versus clericum, quamvis et rictus respondere voluerit in foro seculari, iudex tamen ecclesiasticus cognitionem habere non poterit, nec regiam auferre jurisdictionem: In causa enim sanguinis non poterit ecclesiasticus iudex cognoscere, neque judicare, nisi irregularitatem committat. Et quamvis neminem valeat morti condemnare, degradare tamen poterit criminum convictos, vel perpetua carceris inclusione custodi e.*

The Mirror hath generall words, *Lesglise et cy enfranchise que nul lay judge ne poet aver conusans de clarke, tout le voilloit le clarke conusre par son judge, &c.*

Two of these ancient authors have spoken of felony, and so are the other two to be intended; for the priviledge of the church did not extend to high treason, *crimen læsæ majestatis*, as by divers judicall records and authorities in law shall appeare.

Walter de Berton clerke counterfeited the great seale, which was high treason, *crimen læsæ majestatis*, whereof he was indited and convicted: for so the record saith, *Qui convictus fuit pro falsificatione sigilli domini regis, quod tradatur episcops Sarum, qui eum petiit ut clericum suum, sub pœna et forma qua decet, quia videtur concilio, quod in tali casu non est admittenda purgatio.*

This delivery to the ordinary was by ordinance of parliament *de gratia, et non de jure*: for it was resolved, that hee could not make his purgation; and therefore hee was delivered to him *sub pœna, &c.* In the reigne of Ed. 3. it was taken for a generall rule, *quod privilegium clericale non competit seditioso equitanti cum armis, platis et cotearmuris, secundum leges Angliæ.*

In 17 E. 2. in the time of the parliament, Adam de Orleton, bishop of Hereford, was indited of high treason, for being party and privie, aiding and abetting of Roger Mortimer earle of March with horse and armes in his open rebellion; and because he could not have any priviledge of clergy by the common law, the archbishop of Canterbury, Yorke, and Dublin, and their suffragan bishops, came to the barre (in that disordered time) and with force tooke him from the barre: all which was done by pretext and colour of the canons of the church, which you may reade in Linwood.

But, omitting many other things that might be here rehearsed, let us see what acts of parliament have ordained in this case; for the clergy never thought them selves sure of this priviledge, till it was confirmed to them by authority of parliament. By the statute of W. 1. it is provided, *Que quanti clerke est prise pur ret de felonie, et soit demand per ordinarie, a luy soit liver selonque le priviledge de saint esglise, in tiel perill come ils appent, selonque le custume avant ces leures use, &c.* where note, this act extendeth but to felony.

See the exposition of the statute of W. 1. in this point, and the charge as is given to ordinaries, that none be delivered without

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* Mirr. cap. 3.
del exception de
clergie accord.

Flet. lib. 6.
ca. 36.

Mirr. ubi supra.

Rot. Parl. anno
21 E. 1. rot. 9.

Trin. 21 E. 3.
coram rege, rot.
173. Hentford.

17 E. 2. rot.
Rom. m. 6.

Henricus Blan-
ford.

Linwood tit. de
foro compet.
cap. Contingit.

W. 1. cap. 2.
See Marlbridge,
cap. 27.
See hereafter,
cap. 5.

4 H. 4. cap. 3.
23 H. 8. cap. 1.

Pl. coram domi-
no rege apud
Sandwicum in
cro' Hilarii, an.
22 E. 1. rot. 15.
Kanc'.

due purgation; but it is worthy our paines to reade the statutes of 4 H. 4. and 23 H. 8.

After this statute, and in this kings time, Guinandus de Briland, parson of Snodiland in the county of Kent (in which towne Solomon de Rolfe, one of the kings justices in eire, and one that punished the extortions and other crimes of the clergy, dwelt) came to dine with Solomon de Rolfe, and brought poyson with him of his malice prepenfed, to murder by poyson the said Solomon; and the record of his inditement faith, *Cum eo comedit, et posuit venenum in cibo et in potu ipsius Solomonis, et ipsum impositonavit, per quod, post quindecim dies sequentes inde obiit*: and albeit of all felonies, murder is the worst, and of all murders, murder by poyson is the most unavoidable and detestable, and Guinand being indited and arraigned upon the said inditement, *et quæstus qualiter se vellet acquietare, dicit, quod clericus est, et non potest hic inde respondere, et super hoc venit frater Thomas episcopus Rossensis, et petit ipsum tanquam clericum, &c. Et ut sciatur qualis deliberare debet, inquiratur rei veritas per patriam; et jurat* &c. *dicunt super sacramentum suum, quod prædict' Guinandus dedit prædict' Solomoni venenum unde impositonatus fuit, et inde obiit, ut prædictum est.* But in the end he was delivered to the ordinary, as by the record it appeareth, and thereby, for any thing that wee find in that or any other record, he escaped the sentence of death, which was due for his offence by the law of God, and by the common law of the realme grounded upon the same, *Quicumque effuderit humanum sanguinem, fundetur sanguis illius, ad imaginem quippe Dei factus est homo.* And againe, in the book of Numbers, *Hæc semperterna erunt et legitima in cunctis, homicida sub testibus punietur, &c. non accipies pretium ab eo, qui reus est sanguinis, statim et ipse morietur, ne polluat terram habitationis vestræ quæ insontium cruore maculatur, nec aliter expiari potest, nisi per ejus sanguinem, qui alterius sanguinem fuderit.*

Genes. cap. 9.
ver. 6.

Numer. cap. 35.
ver. 29, 30, 31.
33.

8 E. 2. coron.
419.
22 E. 3. ib. 248.

In 8 E. 2. a clerke convict for felony, and delivered to the ordinary, murdered his keeper, and fled, *et non obstante clerimonia sua*, hee was hanged. And the like was done in 22 E. 3.

The abuse of delivery of clerkes to the ordinary grew so intolerable, as in the end it was taken away; as hereafter shall be shewed.

See the statute of 18 E. 3. cap. 2. concerning this matter.

Rot. Parl.
25 E. 3. nu. 68,
&c.

At the parliament holden in anno 25 E. 3. the clergy did complaine, that one Hanketun Honby a knight, and one of the clergy, had judgement given against him for high treason to be hanged, drawne, and quartered: also for a judgement given against a priest at Nottingham, for killing of his master, sir Thomas Cibethorp, a clerke of the chancery, one of the kings justices.

25 E. 3. ca. 4.
& 5. 4 H. 4.
cap. 3.

And lastly, for hanging of divers monkes of Combe for felony. Thereupon at this parliament an act of parliament was made, wherein it is recited, that the prelates had grievously complained, praying thereof remedy, for that secular clerkes, as well chapleines, as other monkes, and other people of religion had been drawne, and hanged by award of the secular justices, in prejudice of the franchises of holy church, &c. It is accorded and granted by the king, that all manner of clerkes, as well secular as religious, which should be convict before secular justices for any treasons or felonies touching other persons, then the king himselfe or his royall majestie, should freely have and enjoy the priviledge of holy church, &c.

&c. Hereby two things are to be observed: first, that hee shall not be delivered to the ordinary before hee be convicted: secondly, that the priviledge of the church extended not to high treason touching the king, *crimen læsæ majestatis*, but to petit treasons and felonies touching other persons.

About six yeares after this act, the abbot of Missenden in the county of Buckingham, was adjudged to be drawne and hanged for high treason, *viz. for controfactions, et resedione legalis monetae*.

Coram rege
Mich. 31 E. 3.
rot. 55. Buck.

Rot. Parl.
1 H. 4. nu. 73.

At the parliament holden in the first yeare of H. 4. on the first Thursday after the bishop of Canterbury had willed the lords, that in no wise they should disclose any thing that should be there spoken, the earle of Northumberland demanded of the lords what were best to be done for the life of king Richard the second; thus farre are the words of the roll of the parliament: at this time spake that worthy prelate John Merkes bishop of Carlisle, and said, that they ought not to proceed to any judgement against king Richard for foure causes: first, that the lords had no power to give judgement upon him that was their superiour, and the lords annointed: secondly, that they obeyed him for their soveraigne lord and king 22 yeares or more: thirdly, if they had power to give judgement against him, they ought in justice to call him to his answer; for that (said he) is granted to the cruellest murderer, or arrantest thiefe in ordinary courts of justice: fourthly, that the duke of Lancaster had done more trespasse to king Richard and his realme, then king Richard had done to him or them, &c. and desired, that if they would proceed against him, that the names of them that so would proceed might be entred into the parliament roll. It is true, that the parliament roll omitteth this speech of the bishop, but it appeareth by the parliament roll, that the lords proceeded against king Richard, and adjudged him to perpetuall prison, whose life they would by all meanes to be saved, as the roll reporteth. The names of the bishops, and lords, and knights that assented, are set downe, as the roll of the parliament reports; so as it seemeth, that the stout and resolute speech of the worthy bishop wrought some effect: for this speech he was arrested by the earle marshall, and being for a small time committed to the custody of the abbot of Saint Albons was soon delivered; against him never any judicall proceeding was had for this speech in parliament: but this bishop, transported with excesse of zeale, and affectionate desire of the enlargement and restitution of king Richard, was party and privie to the conspiracie of Thomas Holland earle of Kent, John Holland earle of Huntingdon, John Montacute earle of Salisbury, Edward earle of Rutland, Thomas lord Spencer, and others, to kill the king, under colour of jousting and pastimes in the Christmasse time, at the castle of Windesore, where the king lay in the first yeare of his reigne: for this he was indited of high treason, arraigned, tryed, and had judgement as in case of high treason. But *cor regis in manu domini*, the king pardoned him, and set him at liberty. Many more presidents might to this end be produced, but we will conclude this point with a resolution of all the judges in 24 H. 8. A priest was attainted by verdict at the gaole-delivery at Newgate, for clipping of the kings coine, *viz.* George Nobles, and by advice of all the judges judgement was given against him to be drawne and hanged, as another lay person,

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Vid. Rot. Parl.
an. 2 H. 4. nu.
30. See the re-
cord of his at-
tainer, Hill.
2 H. 4. coram
rege, rot. 6.

Trin. 24 H. 8.
Justice Spilman's
report.

because it was high treason, and without degradation he was executed at Tiborne.

Now for murder, burglary, robbery, sodomy, rape, burning of houses, and many other felonies, the benefit and priviledge of clergy is taken away by divers acts of parliament, whereunto the bishops were party, whereof you may reade, lib. 11. Alexander Poulsters case, and where the benefit and priviledge of clergy remaineth, the party that takes the benefit of it shall not be delivered to the ordinary, nor make any purgation (which had been much abused) but forthwith be enlarged and delivered out of prison by the justices, by whom such clergy is allowed, as by another act of parliament, whereunto the bishops were party appeareth.

* Amongst the ancient customes and liberties of England recognized and declared in the parliament before mentioned, holden in the eleventh yeare of Henry the second, this was one, *Cleri accusati de quacunque re, summoniti à justiciario regis, veniant in curiam ipsi responduri ibidem de hoc, unde videbitur curiæ regis quod ibi sit respondendum, et in curia ecclesiastica, unde videbitur quod ibi sit respondendum, ita quod regis justiciarius mittet in curiam sanctæ ecclesiæ, ad videndum quomodo res ibi tractabitur, et si clericus convictus, vel confessus fuerit, non debet eum de cætero ecclesiæ tueri.* So as in effect the ancient law and custome of England in that case is restored.

Lastly, out of what root this priviledge sprang? It took his root from a constitution of the pope, that no man should accuse the priests of holy church before a secular judge, which being contrary to the crowne and dignity of the king, and the common law bound not here, till it was confirmed by parliament, and the rather, for that the church had no power to punish the offence; but where their claime was generall, the parliament of Edw. 1. and custome of the realme restrained it onely to felony, so as they were to answer to high treason, and all offences under felony.

(1) *Clericus ad ecclesiam fugiens, &c.*] By this law, if any that was *infra sacros ordines* committed felony, and for his tuition fled to a church, if he claimed the priviledge of his clergy, he should not be compelled to abjure, but submitting himselfe to the law of the kingdome, he should enjoy the priviledge of his clergy. See more of this matter in the next § *secundum laudab*.

(2) *Secundum laudabilem consuetudinem regni.*] So as this priviledge of the clergy took not his vigour or strength by force of any forraigne councell or canon, but by authority of parliament, and by the laudable law and custome of the kingdome, a point worthy of observation, the answer being so cautelously penned in those dayes, lest any thing in the petition should countenance any forraigne jurisdiction: but so farre as *lex et consuetudo regni* have allowed of the priviledge of the clergy, so farre, and no further it is to be allowed; and yet with this limitation, so as the clerke would submit himselfe (as hath been said) to take it by the law of the kingdome expressed in these words, *sed legi regni se reddens, &c.*

He that is within orders hath a priviledge, that albeit hee have had the priviledge of his clergy for a felony, he may have his clergy afterwards againe, and so cannot a lay-man; and he that is within orders, and hath his clergy allowed, shall not be branded in the hand. But these priviledges are given by act of parliament.

Lib. 11. fol. 29.
Alexander Poulsters case. 23 H. 8.
ca. 1. 25 H. 8. c.
3. 28 H. 8. c. 1.
32 H. 8. cap. 3.
1 E. 6. cap. 12.
5 E. 6. cap. 9.
8 El. cap. 4.
39 El. ca. 9. &
15. 18 El. ca. 7.
* 11 H. 2. apud
Clarendon, ubi
sup. cap. 12.

Polichro. lib. 4.
cap. 24. Gaius
Pope.

Vid. Stamf. pl.
cor. 122, 123,
&c.

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Vid. W. 1. ca. 2.
solonque le cu-
stome avant ces
Leyres usc.

4 H. 7. cap. 13.

C A P. XVI.

ITEM, quanquam confessio coram illo qui non est iudex confitentis, locum non teneat, nec sufficiat ad faciend' processum, vel sententiam proferendam: quidam tamen seculares iudices clericos, qui de foro suo in hac parte non existunt, reatus proprios, et enormes, ut puta furta, roberias, homicidia, coram eis confitentes, admittunt accusationem illorum, quam ipsi communiter vocant appellum, ipsos sic confitentes, et accusantes, seu appellum facientes, non liberant prælatis eorum post præmissa, quanquam super his fuerint sufficienter requisiti, licet coram eis etiam per confessionem propriam judicari vel condemnari nequeant, absque violatione ecclesiasticæ libertatis. *Responsio:* Appellatori (1) in forma debita, tanquam clerico, per ordinarium petito libertatis ecclesiasticæ beneficio, non negabitur. Nos desiderantes statui ecclesiæ Anglicanæ, et tranquillitati, et quieti prælatorum, et cleri prædictorum (quatenus de jure poterimus) providere, ad honorem Dei, et emendationem status dictæ ecclesiæ, et prælatorum, et cleri prædictorum, omnes et singulas responsiones prædictas, ac omnia et singula in eisdem responsionibus content' ratificantes et approbantes, ea pro nobis et hæredibus nostris concedimus, et præcipimus in perpetuum inviolabiliter observari: volentes, et concedentes pro nobis et hæredibus nostris, quod prædicti prælati, et clerus, et eorum successores in perpetuum in præmissis jurisdictionem ecclesiasticam exerçant, juxta tenorem responsionum prædictarum, absque occasione, inquietatione, vel impedimento nostri, vel nostrorum hæredum, seu ministrorum quoruncunque. In cujus, &c. Test. &c.

ALSO notwithstanding that a confession made before him that is not lawful judge thereof, is not sufficient whereon process may be awarded, or sentence given; yet some temporal judges (though they have been instantly desired thereto) do not deliver to their ordinaries, according to the premisses, such clerks as confess before them their heinous offences, as theft, robbery, and murder, but admit their accusation, which commonly they call an appeal, albeit to this respect they be not of their court, nor can be judged or condemned before them upon their own confession, without breaking of the churches privilege. The answer. The privilege of the church, being demanded in due form by the ordinary, shall not be denied unto the appealour, as to a clerk. We desiring to provide for the state of holy church of England, and for the tranquillity and quiet of the prelates and clergy aforesaid, as far forth as we may lawfully do, to the honour of God, and emendation of the church, prelates, and clergy of the same; ratifying, confirming, and approving all and every of the articles aforesaid, with all and every of the answers made and contained in the same, do grant and command them to be kept firmly, and observed for ever; willing and granting for us and our heirs, that the foresaid prelates and clergy, and their successors, shall use, execute, and practise for ever the jurisdiction of the church in the premisses, after the tenour of the answers aforesaid, without quarrel, inquieting, or vexation of us or of our heirs, or any of our officers whatsoever they be.

T. R.

T. R. at York, the xxiv. day of November, in the tenth year of the reign of king Edward, the son of king Edward.

Wee have been the longer in exposition of the former chapter, because wee should be the shorter in this which somewhat concerneth the same matter.

(1) *Appellatori, i. Probatori.*] Albeit the clergy here pretended, that the confession of a clerke (when he was indited of felony, and confessed the felony, and became an approver) was *coram non iudice*; yet the continuall opinion and resolution of the judges were against this: for they resolved, that such a clerke as confessed the felony before a secular judge, could not make his purgation, and consequently, the confession did bind him: and therefore Shard in 25 E. 3. spake in the person of a prelate. And when the clerke was delivered to the ordinarie, without any purgation to be made, he ought to have degraded him; but commonly, if the offender were a monke, he delivered him to his abbot to remaine in the abbey perpetually: and if he were secular, he remained in the bishops prison, &c. in a very favourable manner; which abuses grew so odious and insufferable in encouragement of malefactors in their wickednesse, as they were justly taken away, as is aforesaid.

An appeale of robbery was brought against J. de B. monke of L. who pleaded not guilty, and put himselfe upon the tryall of the country, who found him not guilty, whereupon the abbot of L. and the said Monke, brought a writ of conspiracie against divers, which procured and abetted the said appeale, and recovered a 1000 markes in damages, which could not have been recovered, unlesse the monke had been *legitimo modo acquietatus*, before a competent judge: and hereby it appeareth, that a clerke might wave the priviledge of his clergy, if he would, and be tryed by the course of the common law. And note, when hee knew himselfe free and innocent, then hee would be tryed by the common law; but when he found himselfe fowle and guilty, then would he shelter himselfe under the priviledge of his clergy: and though they committed temporall crimes, yet would they not be tryed by the temporall lawes, which was the more against reason, because no other law within this realme could punish them for the same, but the temporall lawes onely.

10 E. 3. cor. 247.
27 H. 6. fol. 7.
13 E. 4. 3.
3 H. 7. 2.
25 E. 3. coron. 128.
Vid. 12 R. 2.
coron. 109. &
247. 8 E. 2. coron. 417.

24 E. 3. 73. a.
22 E. 3. cor. 276.
lib. 11. fol. 77.
Magd. Colledge
case.

The Exposition of 18 Edw. 3. Cap. 7. of Tithes.

* *ITEM* que per la ou briefes de scire fac' eient estre grantes (1) a garner prelates religious et auters clerkes (2), a respondre des dismes a nostre chancerie, et a monstrier s'ils eient riens pur ensachent riens dire pur quoi tiels dismes a les demandants ne deinent estre restitus, et a responder auxibien aux nous, come a partie de tieux dismes. † *Que tieux briefes desere en avant ne soient grantes, et que les proesses pendants sur tieux briefes soient anientes et repeales, et que les parties dismisies devant secular juges de tiels manners de pleas: saves a nous nostre droit* (3), *tiel come nous et nous ancestres avouns eit, et soloions avoir de reason. En testimoniance de quele chose, a le request des dites prelates a cestes presentes lettres avouns fait metre noz seale. Done a Londres le 8 jour de July lan de nostre reigne Engleterre disoitisme, et de France quints.*

* Le preamble.

ITEM, whereas writs of scire facias have been granted to warn prelates, religious and other clerks, to answer dismes in our chancery, and to shew if they have any thing, or can any thing say, wherefore such dismes ought not to be restored to the said demandants, and of answer as well to us, as to the party of such dismes; that such writs from henceforth be not granted, and that the procefs hanging upon such writs be adnulled and repealed, and that the parties be dismisied from the secular judges of such manner of pleas; saving to us our right, such as we and our ancestors have had, and were wont to have of reason. In witness whereof, at the request of the said prelates, to these present letters we have set our seal. Dated at London the eighth day of July, the year of our reign of England the eighteenth, and of France the fifth.

† Le act.

Before we enter into the exposition of this act, we will cleare it of an objection against the life of it, *viz.* That it should be no act of parliament, but an ordinance made by the king onely at the request of the prelates: and that the king to these letters had put his seale, and the *teste* and date as done by the king only; all which, say they, appeare in the parliament roll, and that the clause of *En testimoniance de quel chose, &c.* is left out of the print.

But hereunto we answer, that by the said clause *En testimoniance de quel &c.* is to be understood, that this act was so plausible to the prelates, that they requested the king, that it might be exemplified under the great seale for the better preservation thereof, which the king granted. This parliament began the Munday after the *Ozab. Trinitatis*, which was 16 Junii; and this exemplification was 8 Julii after this act was passed, there being but seven acts passed at this parliament. And *en testimoniance de quel*, and the whole clause following, are words of an exemplification.

Vide Rot. Parl. 18 E. 3. nu. 31.

Now that this ordinance before the clause of the exemplification is an act of parliament, first, is proved by divers reasons, *viz.* The title of the parliament is, *Incipit statutum regis Edwardi anno regni*
vis

fai decimo oſtavo. Secondly, it is entred in the parliament roll. Thirdly, it was by force of the kings writ (as the uſage then was) proclaimed as an act of parliament, which writ in French we thinke good to tranſcribe in theſe words: *Edward per le grace de Dieu roy Dangleterre et de France, et ſeigneur Dirland a noſtre viſcount de Nottingham, ſalus. Sachez que a noſtre parliament tenuſ a Weſtm' le Lundye procheine apres les oſtaves de la Trinity procheine paſſis entre autreſe choſes monſtres, aſſentus, et accordes en dit parliament, ſi furent monſtres, aſſentus et accordes les choſes ſous eſcrites.* And after a rehearſail of all the ſtatutes, whereof this ſeventh chapter is one, the concluſion is, *Et pur ceo vous mandous, que tous les ſtatutes faces crier et publier, et fermement tenir per mye voſtre baillie ſelonque la forme et tenur dicelle. Et ceo ne leſſes en aſcun maniere, &c.*

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And F.N.B. 30 E. taketh it for a ſtatute, and ſo it hath ever been by the generall conſent from time to time of learned men. And if it ſhould not be a ſtatute, it would worke great trouble and diſquiet in the realme. Now that wee have cleared this objection, let us peruſe the words of the act.

(1) *Ou briefes de ſeire facias eient eſtre grantes, &c.*] This rehearſail in this ſtatute is true; for wee have found, that upon divers matters of record, that is to ſay, enrolled, returned, or removed into the chancery: firſt, upon tithes granted by the kings letters patents, which are inrolled in the chancery, writs of *ſeire fac'* were brought in that court: as taking one example for many: in 17 E. 3, a *ſeire fac'* was brought by the king, and the dean and canons of the kings free chappell of Saint Martins London, upon letters patents of Mawd, *quondam reginæ Angliæ* of tithes, &c. againſt the abbot of Saint Johns of Colcheſter, who took the ſame after ſeverance, whereunto the abbot pleaded, &c. worthy to be ſeen.

(2) *A garner prelates religious et auters clerks, &c.*] Note, this *ſeire fac'* was not brought againſt the poſſeſſors of the land for ſubſtraction of tithes, but againſt the prelates, or other clerkes, which took the tithes after they were ſevered. See 6 E. 1. in *bundello petitionum in turri London*, where the petition was for ſubſtraction of tithes, to be put in poſſeſſion: the answer was in parliament anno 6 E. 1. *Rex non intromittit ſe de hiis quæ taliter ſpectant ad forum eccleſiaſticum, proſequatur jus ſuum verſus clericum coram ordinario.* Herewith agreeth Braſton, lib. 5. fol. 403. & 407.

Commiſſions out of the chancery were directed to certaine perſons, giving them authority to enquire, whether ſuch a ſpirituall perſon ought to have tithes of ſuch lands, whereupon inquiſitions were taken and returned; and if it were found for the ſpirituall perſon, upon this record he might have a * *ſeire fac'* againſt any prelate religious, or other clerke that took them after ſeverance.

* See 22 Aſ. P.
75.

^a Rot. clauſe 7.
E. 2.

^a *Compertum eſt per inquiſitionem rectorum, et vicariorum vicinorum de Erwel, quod vicarius eccleſiæ ibidem percipere debet minutas decimas omnium animalium ibidem, et molend' aquatic' ibidem.* But no *ſeire fac'* was ſued hereupon, for that the vicar was to ſue for ſubſtraction of theſe tithes againſt the owner of the land in the ſpirituall court.

^b In fin. Term.
Trin' 10 regis
Johannis.

^b Alſo upon a fine executory of tithes before this act, the tenour whereof was removed into chancery, a *ſeire fac'* did lye therefore againſt the ſpirituall perſon that perned the ſame after they were ſevered.

[3] *Savant a nous nostre droit, &c.*] By force of this saving not onely the king himselve, but the provost of C. being the kings patentee of tithes of the new assarts in the forest of Rockingham in the county of North-hampton, brought a *scire fac'* in the chancery after this statute, against certaine persons of holy^d church, who had taken the tithes granted to him, to have execution of the said tithes, according to the kings letters patents. The^e defendants pleaded to the jurisdiction of the court, that the consufance of this cause for tithes appertained to court christian, and not to the chancery, whereunto it was answered by the court, that that was to be understood, where the suit was taken against them that ought to pay the tithes (that is to say) for subtraction of tithes, and not when it was brought against them, that were wrongfull takers of the tithes. And all this is well warranted by the book, whereupon the defendants pleaded to issue, and the record delivered over to be tried in the kings bench. See Hill. 32 E. 1. *coram rege* Wigorn' the Prior of Worcesters case resolved by the chancellor, treasurer, and all the judges and barons, that appropriation of tithes is no mortmaine,^f *Quia decimæ sunt mercæ spirituales, quarum cognitio ad curiam christianitatis pertinet, et non ad curiam istam.*

And yet the inference that Fitzherbert maketh, that before this statute of 18 E. 3. the right of tithes was tried in the kings court was true: for upon a *scire facias* by a spirituall person against a spirituall person, and for tithes^{*} which were spirituall, the right of tithes was tried in the *scire fac'* before this statute, albeit the tithes were severed, which is now taken away in case of the *scire fac'* by this statute.

And at this day, albeit in case of tithes, the parties by pleading admit the jurisdiction of the court, yet if it be between spirituall persons, and the right of tithes come to be tried, albeit it be after the tithes severed, the court *ex officio* shall ouste the court of jurisdiction, which we hold, where the right of patronage was not drawne in question, was wrought by the construction and consequent of the said statute of 18 E. 3. for before that statute right of tithes, after severance was tried in a *scire fac'* by the common law in certaine cases. But when the right of tithes trench to the dissolution or diminution of the advowson, &c. in certaine cases, the right of tithes at this day (as hath beene said) shall be tried *in brevi de recto advocat' decimarum*, and in the *indicavit*: but neither of these writs give any jurisdiction to the kings court, to hold plea for subtraction of tithes, but that is sent to the ecclesiasticall court to determine.

45. Pasch. 7 E. 1. in Banco Rot. 78. Gloc'. Eliz. Penbreges case. Mich. 9 E. 1. in Banco Rot. 88. Salop. Bract. l. 5. 402. Placita de advocat. Eccl. spectant ad Coronam. Fleta, l. 6. ca. 36. Glanv. l. 4. ca. 13. acc'. 18 E. 2. bre. 825. 4 E. 3. 27. Rot. pat. 27 E. 3. 1. ps. nu. 18. F.N.B. 44. k. 45. b. c. d. 50. q. r. 51. c. 1. 30. e. g. 37. e. Vid. bre. de Indizav. Vid. Regist. 29. b. de rect. advocat. decim. Regist. 36. b. prohibition. de decimis reparatis. W. 2. ca. 5. 4 E. 3. 27. per Panning. 7 E. 3. 42. 8 E. 3. 49. 38 E. 3. 13. 16 E. 3. Quare Impedit. 147. 31 H. 6. 13. 38 H. 6. 20. 12 E. 4. 13. 2 H. 7. 12. Doct. & Stud. lib. 2. cap. 25. fol. 108.

Nullus pro decimis quæ sunt spirituales de aliqua reparatione pontis seu aliquibus oneribus temporalibus onerari debet. But at this day if tithes be in the hands of temporall men, they are by reason of them contributory to temporall charges.

^c 22 Ass. pl. 75. 38 Ass. pl. 20. Bro. tit. Dismes 10 Pla. Parlam. Hill. & Pasch. 18 E. 1. the Bish. of Carlises case, to whose predecessors Hen. rex vetus concessit omnes decimas in Foresta de Englewe.

14 H. 4. 17. ^d Note, this act of 18 E. 3. is not mentioned in this book of 22 Ass. because the case was taken to be within the saving.

^e Note, albeit this book was after the stat. yet doth it open the true sense & reason of the common law before this statute of 18 E. 3. ^f Pasch. 20 E. 1. in banco regis, rot. 135. Buck. F.N.B. 30 E.

* [641] 23 E. 3. f. 6. 8. a. b. 22 E. 4. 23. 24. 20 H. 6. 17. 31 H. 6. 11. 35 H. 6. 39. 47. 38 H. 6. 12. 6 E. 4. 3.

Trin. 5 E. 1. in Banco. 29 Norff. Pasch. 12 E. 1. Rot. 28. Norff. Abb de Selbies case. Pasch. 19 E. 1. in Banco Rot.

88. Trin. 35 E. 3. coram Reg. Rot. 72. Mid. Vid. 32 H. 8. ca. 7. Dier 7 E. 6. 33. l. 11. fo. 25. b.

in Henry Harpers case.

Where

10 H. 7. f. 18.
2. per Brian.
44 E. 3. 5.
Doct. & Stud.
lib. 2. cap. 55.
7 E. 6. Dier fo.
84. & F.N.B.
54. b. Lib. 2.
fo. 44. in Le-
vesque de Win-
chesters case.
But Parning in
7 E. 3. fo. 5.
pl. 8. who not
long after was
lord treasurer,
and after lord
chauncellor,
voucheth it
truly, for hee
saith that of
auncient time
before a new
constitution
made by the
pope, the patron
of one church
might grant his
tithes to another
parish, that is, by
the constitutions
made by pope In-
nocent 3. anno
dom. 1200. in
his decretall epistle,
which you shall finde in his 6. Epistle. Decret. lib. 1. p. 452. edit. Colon. See
the statutes of 18 E. 3. cap. 7. 1 R. 2. cap. 14. 5 H. 4. ca. 1. 27 H. 8. c. 20. 32 H. 8. c. 7. 2 E.
6. c. 13. Regist. 179, 180. † Anno 2 Regis Johannis. In bundello petitionum parlam.
anno 6 E. 1. in Turri.

Where it is said in some of our books, that of auncient time before the councell of Lateran, any man might have given his tithes to what spirituall person he would, and that at that councell it was provided that tithes in one parish should be given to the rector, or parson of the same parish, that hee that gave the spirituall food, should reap temporall, &c. The truth is, that I have perused the councels holden at Lateran, and specially that holden under pope Alexander the third, anno Domini 1179, anno 25 H. 2. and cannot finde any such decree: but pope Innocent the third, in a decretall epistle, in or about the yeare of our lord † 1200. and the first yeare of king John dated at Lateran, directed to the archbishop of Canterbury, *ut ecclesijs parochialibus juste decimæ persolvantur*, hath these words, *Pervenit ad audientiam nostram, quod multi in diocesi tua decimas suas integras vel duas partes ipsarum non illis ecclesijs in quarum parochiis habitant, vel ubi prædia habent, et à quibus ecclesiastica percipiunt sacramenta, persolvunt, sed eas alijs pro sua distribuunt voluntate. Cum igitur inconveniens esse videatur, et à ratione dissimile, ut ecclesiæ, quæ spiritualia seminant, metere non debeant à suis parochianis temporalia, et habere; fraternitati tuæ auctoritate præsentium indulgemus, ut liceat tibi super hoc, non obstante contradictione vel appellatione cujuscumque, seu consuetudine hactenus observata, quod canonicum fuerit ordinare et facere quod statueris per censuram ecclesiasticam firmiter observari, nulli ergo, &c. confirmationis, &c. Dat. Lateran. nonas Julii.* And (that I may speake once for all) this epistle decretall bound not the subjects of this realme, but the same being just and reasonable they allowed the same, and so became *lex terræ*.

See Linwood *cap. de locato et conducto*, fo. 117. *verbo portiones*, where he saith, *Quod ante consilium Lateranense, anno Domini 1179. bene potuerunt laici decimas in feudum retinere, et eas alteri ecclesiæ dare, non tamen post dicti consilii, &c.* And thus began portions of tithes, that the parson of one parish hath in another. *Vide concilium Lateran', anno Domini 1215. 17 Job. regis.*

Albeit the parochiall right of tithes is now established by divers acts of parliament as before it appeareth (a matter tending to the exceeding benefit and quiet of the clergy) yet he that is desirous to know what the auncient lawes of England were concerning the paiement of tithes before the conquest, let him reade *Fædus Edwardi et Guthruni regum*, cap. 6. *et inter leges Etbelsani* cap. 1. *Inter leges Edmundi regis*, cap. 2. *Leges Edgari regis*, cap. 2. & 3. *Leges Canuti regis*, cap. 8, 10, 11, 12. *et leges Edwardi regis*, * cap. 8, 10. *Quas Wilhelmus Conquestor recitavit, et confirmavit.* All which lawes M. Lambard hath well translated out of the Saxon into the Latine tongue, which was faithfully, but not so accurately, done before him, which wee have.

There hath been great controversie heretofore concerning the tithes of wood, as appeareth by divers petitions in parliament, which petitions together with the answers we will recite, and incidently will shew, how that controversie is quieted, and ended.

Having spoken of tithes, it is said.

* *Hæc prædicationis beatus Augustinus, & concessa sunt à rege baronibus, & populo, &c. Lamb. 128.*

*Vide inter leges Edwardi regis, * ca. 8. ubi supra. de bosco.*

That no man be impleaded for tithes of wood, or underwood, but in places accustomed. The answer was, as heretofore the same shall be. *Item pria le comen, que come * constitution soit fait per les prelates a prendre dismes de cheſcun maner de boyes, quel chose ne fuit unques uſee, et que niefz, et femes poent faire testaments, que est contre raiſon, que pleſe per luy, et per son bon conseil ordeiner remedie, et que son peuple demerge en meſme leſtate quilz ſoloient estre en temps de tous ſes progenitors, et que prohibitions soient grantes a touts ceux que ſont impledes de dismes de bois ſans avoir conſultation.* Whereunto the answer of the king was, the king willeth that law and reason be done.

Item monſtre la commune come nadgaires lerebeſque de Canterbury, et les autres prelates ordinerent une constitution a doner dismes de subbois vendus tantſolement la ou avant ſes heures nulles dismes furent dones, ore les gents de Seint Eſglise per force de la constitution pernent et demandent les dismes auxibies de gros bois, come de subbois vendus et neient vendus, econtre ce qui is ont uſes puis temps de memorie a la grand damage de la commune de quoi ilz prient remedie, de lun point et del autre.

Whereunto the answer is, the archbishop of Canterbury, and the other bishops have answered, that such tithe is not demanded by reason of the said constitution, but of underwood. But the subject being still molested for woods not tithable complained again in anno 25 E. 3. all which were preparatives to a good law made in anno 45 E. 3. cap. 3. *De groſſe boyes dage de vint ans, et de greinder age nul dismes ſerra demands in noſme de ceſt parol ſylva cœdua, eſt ordeine et eſtablie que prohibition en ceo caſe, ſoit grant, et ſur ceo attachement come ad estre uſe avant ceux heures.*

It appeareth before that all the bishops claimed onely tithes de subbois, of underwood, under the name of *ſilva cœdua*, ſo as of haut-boyes, of great wood no tithes were claimed; but herein rested two doubts; 1. what should be said high or great wood. 2. Of what age the same should be, because it is parcell of the inheritance.

As to the first, this act, which is declaratory of the common law, as it appeareth by the book in 50 E. 3. fol. 10. b. 9 H. 6. fol. 56. Pl. Com. fol. 471. and this act it ſelfe proveth it, for it concludeth, *Come ad estre uſe devant ceux heures*; and this is confirmed by divers judgements hereafter cited.

And it is to be understood that this act uſeth theſe words *groſſe boyes*, and not *haut boyes*, or *graund boyes*, which word is also used in the books of 50 E. 3. and 9 H. 6. And in this act this word [*groſſe*] ſignifieth ſpecially ſuch wood as hath been, or is either by the common law or cuſtome of the country timber, for this act extends not to other woods, that have not beene, or will not ſerve for timber, though they be of the greatneſſe or bigneſſe of timber. And it is to be obſerved, that the prohibition in 50 E. 3. for ſuing for tithes in court chriſtian of groſſe boys, was grounded upon the common law, without mentioning of this act.

Here it is to be demanded, to what kinde of wood groſſe boys do extend? And the answer is, that oake, aſh, and elm, are included within theſe words; and ſo is beech, horſbeche, and hornbeam, because they ſerve for building, or reparation of houſes. mills, cottages, &c. againſt the opinion in Plowd. Comment. fol. 470. in

Molyns

Rot. Parl. anno 17 E. 3. nu. 514.
Rot. Parl. 18 E. 3. Artic. 9.

* This constitution was made in anno 17 E. 3. an. dom. 1343. Vide Linwood. Note the aſſe-
vation of the whole body of the realm in this petition, concerning the payment of tithe-wood.

Rot. Parl. 21 E. 7. Artic. 48.
Note alſo theſe aſſe-
verations.

Rot. Parl. 25 E. 3. nu. 37.
Rot. Parl. 45 E. 3. nu. 200 in
the print cap. 3.

Li. Intrat. R. fo. Regiſt. fo. 44.
See the old book of Entries, fo. 34. b. & 34. a. premunire, printed anno dom. 1546.
50 E. 3. 10.
9 H. 6. 56. Pl. Com. 47. lib. 11. fol. 48. b. Liſords caſe.

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See the ſiſt part of the Inſt. f. 3. wait in beech. So it was adjudged coram rege Paſch. 2 Jac. Regiſ. rot. 192. between

Henry Hall, and
Dorothy Fetti-
place. Kanc.

^a Pl. Com. f. 470.
Molyns case.

Tr. 26 El. coram
rege.

^b Hil. 2 Jac. in
Com. Kanc. Rot.
229. int. Brooke
et Rogers.

^c Lib. 11. f. 49.
Liford's case.

Doct. & Stud.
fo. 174, 175.

^d Regist. fo. 49.
lib. 11. fo. 49.

Molyns case, holden without argument, which opinion the whole court upon deliberate advice held to be no law.

^a It was resolved by the whole court, that also is also comprehended within grosse boys, because it may serve for building, or reparation, *ut supra*. But otherwise it is of birch (as it was said) it was adjudged in the case of Lennard *custos breuium*, because that kinde of wood serveth not for building.

^b If a timber tree be *arida, sicca, et non portans folia nec fructus in æstate, nec existens marremium*, and the owner cut it down, and convert it to fuel, &c. no tithe shall be paid thereof for the inheritance which was once in it.

^c So for the bark of oakes, being timber trees, no tithes shall be paid, because it is parcell of the tree, and reneweth not *de anno in annum*. ^d But for acorns tithe shall be paid, because they renew yearly.

As to the second doubt, of what age those grosse or timber trees, whereof no tithes should be had, should be; the statute resolveth this doubt in these words, *Grosse boys del age de 20. ans, ou greinder*. Which point was also declaratory of the common law, as by the conclusion of this act, and the authorities aforesaid appeareth: for this *grosse boys* thus described, it appeareth by the act, that parsons and vicars sued for tithes of them, *en noïme de cest parol, sylva cædua*.

Del age de 20. ans.] This is the age, as to bar all suits in court christian for tithes. And these words are to be understood of grosse trees, which may serve for timber, and grow out of the own stubs: for if a man usually top or lop timber trees, tithes shall not be paid, though they be under the age of 20 years. For as the law privileged the body of the tree, being parcell of the inheritance, so it doth privileged the branches also.

So if a man cut down timber trees, tithe shall not be paid for the germyns or branches which grow out of the roots, of what age soever; for that the root is parcell of the inheritance.

The bishops, and others of the clergie taking upon them to interpret this statute, which belonged not unto them, gave out and published that this ordinance did not restrain their ancient jurisdiction, and that this ordinance was never affirmed for a statute: and thereupon the subject was still vexed in court christian, both contrary to the common law, and the said statute: and thereupon a bill was exhibited in the next parliament following, holden in the 47 year of E. 3. reciting the statute of 45 E. 3. and then shewing that the persons of holy church intending that this ordinance did not restrain their ancient incroachments; and surmising, that this was not affirmed for a statute, held plea in court christian to the contrary of the ordinance aforesaid, to the great damage of the people. Wherefore may it please our sovereign lord the king to affirm the said ordinance for a statute to indure for all times to come; and that a speciall prohibition upon the same statute thereupon be made in the chancery, prohibiting that they should not hold plea in court christian of tithes of wood of the age aforesaid. Whereunto the answer was, that such prohibition be granted, as hath been used of ancient time. Which answer being compared with the conclusion of the act of 45 E. 3. hath given such an end to both these points, as no question hath been made thereof at any time since. And to say the truth, that the surmise that this act of

50 E. 3. 10. b.
44 E. 3. 32. a.
merisme.

Pl. Com. 470. b.
Doct. & Stud. fo.
175. Br. diffmes
14. li. 11. fo. 49.
Liford's case.

Pl. Com. 470.
So resolved
Pasch. 29 El. co-
ram rege. Lib.
11. fo. 49.
Liford's case.

45 E. 3. was but an ordinance, and no statute, was but a meer cavill, without any colour of probability: for 1. it is entred in the parliament roll amongst the other statutes made at that parliament. 2. It is under the title in that roll of statut. E. 3. *de anno regni sui* 45. 3. It was proclaimed by the sherifes (as the usage in those dayes was) amongst the rest of the statutes of that parliament. 4. It hath the phrase of an act of parliament [*Ordeine est et establie*] agreeing therein in effect with the other acts in that parliament. 5. It hath the consent of the lords and commons (who joyn in the petition in the preamble) and of the king. 6. Infinite prohibitions upon this statute, as taking some few precedents, whereof we have the number roll, of such as be not in print.

Coram rege Tr. 27 E. 1. Rot. 28. *Linc. Magister Willielmus persona ecclesie de Epworib attachiatus fuit ad respondend' Stephanano de Rodnes de Gener' laco, et Willielmo Stel de Cottingham de placito quare secutus fuit placitum in curia Christianitatis, de catallis et debitis que non sunt de testamento, vel matrimonio contra prohibitionem regis, &c. Et unde queruntur, quod cum prædictus magister Willielmus secutus fuit placitum versus eos in curia Christianitatis coram offic' episcopi Lincol' de catallis et debitis laicis, viz. de quercubus et aliis arboribus per ipsos empt' de quodam Rogero Mubey. Et idem Stephanus et Willielmus super hoc protulissent prohibitionem domini regis coram prædict' officiariis in ecclesia omnium Sanctorum de North' die Martis prox' post festum Sancti Nicholai, anno regni regis nunc 25. et ei inibuisse ne placitum illud contra prohibitionem prædictam ulterius sequeretur in præsentia Rogeri de Waldebye, Gened' de Cave, Willielmi de Clere, et Thomæ de Redneffe tunc ibidem præsentium, idem tamen magister Willielmus non obstante prohibitionem prædictam placitum præd' ulterius secutus fuit quousque ipsi per sectam suam prædictam excommunicati fuerunt; unde dicunt quod deterierati sunt et dampnum habent ad valentiam C. l. et in contempt' domini regis mille libr', &c.*

Et prædictus magister Willielmus venit et defendit, &c. et dicit quod nullum placitum de bonis et catallis laicis secutus fuit in curia christianitatis contra prohibitionem domini regis sicut ei imponunt, et vadiavit eis inde legem jē 12. manu, &c. And had a day to make his law, at which he came; and incept (saith the record) *jurare, et post quartum juratum defecit de lege, ideo consideratum est, quod prædict' Stephanus et Willielmus recuperarent damna sua prædicta centum librarum, et fecit finem cum rege ad 40 l.*

It is to be noted, that the parson stood not upon his right to have tithes of oake and other trees; but the colour he had to wage his law, was in respect of these words, *De bonis et catallis laicis*, and tithes are not lay-chattels: but he durst not in that case stand to it to make his law, but upon failing therein, judgement was given against him of the damages, as the plaintifes had counted.

See lib. Intrat. Raff. fol. 448. b. nu. 2. 449. a *prohibition sur lestatute de* 45 E. 3. circa 14 H. 7. The old book of Entries, fol. 34. b.

Hil. 33 H. 8. Rot. 78. Inter Stelling et Spooner.

Ibidem Rot. 103. Inter Peiers et Dixon.

Mich. 34 H. 8. Rot. 116. Inter Felton et Glover.

Pasch. 36 H. 8. Rot. 116. Inter Smy et Ap. Richard.

Mich. 36 H. 8. Rot. 1. confimilis prohibitio.

Hil. 36 H. 8. Rot. 1. confimilis prohibitio.

Pasch. 38 H. 8. Rot. 1. confimilis prohibitio.

II. INST.

3 T

Mich.

Regist. 34. the same prohibition, & 50 E. 3. 10.

De quercubus & arboribus. Vide Pasch. 15 E. 1. in banco Rot. 52. Linc. mille quercus, &c.

The law at this day, and long after was holden, that in this case he might wage his law.

18 E. 3. 4. 24 E. 3. 39. so adjudged, 32 E. 3. tit. Ley. 62. But in 44 E. 3. fo. 32. it is otherwise ruled, because it is not in a writ of contempt; and so hath the law been taken ever since.

Prohibitions coram rege tempore H. 8.

Coram rege
tempore E. 6.

Mich. 38 H. 8. Rot. 1. consimilis prohibitio.
Trin. 1 E. 6. Rot. 94. consimilis prohibitio. Inter Herne &
Croft.
Mich. 2 E. 6. Rot. 97. Inter Heford & Howe.
Mich. 3 E. 6. Rot. 1. consimilis prohibitio.
Pasch. 4 E. 6. Rot. 1. consimilis prohibitio.
Hil. 5 E. 6. Rot. 2. consimilis prohibitio.
Trin. 6 E. 6. Rot. 1. consimilis prohibitio.
Mich. 1 Ph. et Mar. Rot. 159. Inter Gray et Philpot, con-
similis prohibitio.

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Coram rege tem-
pore Marie.

Pasch. 1 Mar. rot. 1. consimilis prohibitio.
Hil. 1 et 2 Ph. et Mar. Rot. 1. consimilis prohibitio.
Pasch. 1 et 2 Ph. et Mar. Rot. 3. consimilis prohibitio.
Trin. 1 et 2 Ph. et Mar. Rot. 10. consimilis prohibitio.
Mich. 2 et 3 Ph. et Mar. Rot. 4. consimilis prohibitio.
2 et 3 Ph. et Mar. Rot. 1. consimilis prohibitio.
3 et 4 Ph. et Mar. Rot. 2. consimilis prohibitio.
Hil. 4 et 5 Ph. et Mar. Rot. 1. consimilis prohibitio.
Mich. 4 et 5 Ph. et Mar. Rot. 1. consimilis prohibitio.

We could cite a world of other examples of this kinde,
out of the kings bench, chancery, and common place, but
in a case whereof never any learned man made any doubt, these
shall suffice.

But this is against the provinciall constitution of Simon Mephram,
anno Domini 1332. anno 6 E. 3. and the exposition of Linwood
thereupon.

Regist. 44. a. b.
See the old book
of Entries, fol.
34. a. the like
prohibition.
The latter book
of Entries, R.
449. a. b. Old
book of Entries,
34. a. 31 H. 8.
tit. prohib.
Brook 17.
Regist. 49. a.

There is a consultation *de sylva cædua*, where the prohibition
was, *De catallis et decimis quæ non sunt de testamento et matrimonio;*
and yet in the consultation there is a restraint (according to the
common law, and the said act of 45 E. 3.) *Dummodo tamen de gros-
sis arboribus in hac parte non agatur, &c.*

If any sue in court christian for tithes *de grossis arboribus ultra
ætatem 20 annorum*, he incurs the danger of a *præmunire*, if so it be
contained in the libell.

In the Register it is said by Herlauston, *Concordatum fuit coram
concilio regis in parlamento apud Sarum, quod consultationes fieri
debent de sylva cædua, eo non obstante, quod non renovatur per annum;
et super hoc facta fuit quædam consultatio pro abbate de Netley, de sylva
cædua.*

Great question hath been made, when this parliament at Salis-
bury was holden, but we shall make it evident, that it was holden
the Friday next after the feast of Saint Mark the Evangelist, in the
seventh yeer of R. 2. which appeareth by William de Herlauston
here named, who was a clerk of the chancery, and as here it ap-
peareth, inserted this into the Register.

Regist. f. 80. b.

7 R. 2. cap. 4.

This Herlauston lived at the time of the holding of this parliament
at Salisbury; for afterward in the same Register, fol. 80. b. it is
said, *Nota que nul home serra prisé, ne imprison, pur vert ne pur venison,
si il ne soit trouve ove le mayneur, ou si il ne soit indite, &c. Et vide inde
statute R. 2. de anno 7. cap. 4. Quando quis taliter fuerit indictatus,
et virtute indictamenti illius est convictus, ita quod non ponet se super
patriam, et sic fiet de illis, qui indictati sunt de receptamento, ac si essent
principales transgressores per Herlauston.*

And in the Register, fol. 261. a. you shall finde this note, *Hoc
breve concessum fuit pro hominibus de Odiham, et concessum fuit pro om-
nibus aliis antiquis dominicis per cancellarium Lescrope, et W. de Her-
lauston.*

laston. Now this Lescrope lord of Bolton was chancellor in *annis* 2 & 5 R. 2. as we finde of record.

Thus have we discovered the clerk that inserted into the Register the said *concordatum* in the parliament at Salisbury: but looking diligently into that parliament roll, no such *concordatum* as Herlaston inserted into the Register can be found, and therefore you must take it upon the trust and credit of this clerk. But admitting that any such *concordatum* had been, as in the Register it is set down, it may well stand with law: for in the Register, fol. 44. there is a consultation (as before hath been said) *de jylva cædua*, and is consonant to law, having such a restraint in the same writ, as is aforesaid.

A country may prescribe to be quit of tithes of wood, or any other tithe, so there be sufficient maintenance and sustentation of the incumbent besides; but a town cannot so prescribe.

Doct. & Stud.
147. b.
Br. Difmes 14.

Rex tali judici salutem. Monstravit nobis venerabilis pater H. Lincoln' episcopus (1), quod cum I. præcentor ecclesiæ beatæ Mariæ Lincoln' teneat de dono suo omnes decimas dominicarum terrarum suarum vel dominici sui de N. quas idem episcopus et prædecessores sui episcopi loci prædicti libere conferre consueverunt: Prior beatæ Catherinæ extra Lincoln. clamans decimas illas pertinere ad ecclesiam suam de B. trahit eum inde in placitum, &c. (2). Et quia placitum prædictum tangit coronam et dignitatem nostram, præsertim cum collatio earundem decimarum ad nos possit devolvi ratione custodiæ vel escaetæ, quia etiam consimiles decimas conferimus in quibusdam dominiciis, et similiter quamplures magnates regni nostri in dominiciis suis: vobis prohibemus ne placitum illud teneatis in curia christianitatis, nec aliquid quod in derogationem regiæ dignitatis nostræ cedere valeat in hac parte attentetis, seu per alios attentari faciatis, quovismodo. T. Sc.

Registr. 36. b.

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Opus est interprete, therefore we will peruse the words of this writ in such order as they doe lye in the same.

(1) *Venerabilis pater H. Lincoln. episcopus.*] Is intended as I take it of Hugh bishop of Lincoln, who deceased soone after: and hereby it appeareth, that this writ was in use before the said constitution of pope Innocent the third, as also is proved by latter words of this writ, which we shall observe when we come to it.

This was S.
Hugh, bishop of
Lincolne, as wee
conceive it.

(2) *Quod cum præcentor ecclesiæ beatæ Mariæ Lincoln. de dono suo teneat omnes decimas dominici de N. Sc. Prior beatæ Catherinæ extra Lincoln. clamans decimas illas ad ecclesiam suam de B. trahit eum inde in placitum, &c.*] Here it may be demanded that seeing the suit is between spirituall persons, and for tithes which are spirituall things, wherefore they should bee prohibited. Hereof three reasons are rendred in this writ. First, *quia placitum prædictum tangit coronam et dignitatem nostram.* For all advowsons are lay fee, and pleas of them doe belong to the kings law, and seeing the whole benefit of the patron of this advowson consisteth in conferring of these tithes to any of his chaplains, &c. And if the tithes be recovered, the advowson vanisheth as a thing without fruit or benefit, and therefore the ecclesiasticall court cannot hold plea of them.

Bre. de Indica-
vit. Bre. de recto
advoc. decima-
rum. Regist.
29. b. Artic.
cleri c. 2. 12 E.
4. 13. b. 4 E. 3. 2.
Glan li. 4. c. 13.
Bract. lib. 5. fo.
402. 403.
Fleta, li. 6. c. 36.
Fitz. N.B. 30. g.
Vet. N.B. 24. a.
Vide Mich. 2 E.
1. in communi
banco. Rot. 52.
Leic. the Prior
of S. Mary de
pratis case. in-
dicavit bre. de
indicavit super
4. partem.

Extravagant tit.
de Decimis, ca.
13. quoniam.

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Mich. 5 E. 3. cor.
Rege. Rot. 168.
Cumbria. 22. Aff.
p. 75. 38 Aff. p. 2.
14 H. 4. fo. 17.
Br. difmes 10.
Acc' Rot. Parl.
18 E. 1. fo. 8.
Lib. 5. fo. 15. in
Caudries case.
li. 2. fo. 44. in
Levesque de
Wincheiters
case.

Rot. Parl. anno
8 E. 2. nu. 17.
in dorf.

Quia tangit, &c. See the writ of *indicavit, et breve de recto de ad-
vocatione decimarum*, before in this second part of the Institutes
W. 2. cap. 2. *versus finem, & Articuli cleri* cap. 2. And if the suit
in the ecclesiasticall court were for substraſtion of tithes, after the
right of the advowſon be tryed for the patron of the perſon that
ſueth, he ſhall proceed in the ecclesiasticall court.

2. The ſecond reaſon yeelded in this writ is, *Præſertim cum col-
latio earundem decimarum ad nos poſſit devolvi ratione cuſtodie, &c.*
And if the tithes ſhould be recovered, as hath been ſaid, the ad-
vowſon ſhould vaniſh, &c.

3. *Quia etiam conſimiles decimas conferimus in quibuſdam dominicis,
et ſimiliter quamplures magnates noſtri in dominicis ſuis, &c.*

By this it is probable, that the king ſpeaking in this writ for him-
ſelfe and the grandes of the realme in the preſent time, that this
writ was in uſe before the conſtitution that confined tithes to pa-
riſhes, and hereby it is proved that at this time the king, and the
nobles of the realme might give their tithes to what ſpirituall
perſon they would. Laſtly albeith the king and the nobles be for
honour ſake named in the writ, yet the liberty of granting of tithes
extended at this time to all the kings ſubjects.

The marginall note in the Regiſter is *de decimis ſeparatis*, ſo called
becauſe they had been granted to ſome ſpirituall perſon, and not
annexed to any pariſh church.

For the better underſtanding of the opinion of Sir William Herle
in the ſaid book of 7 E. 3. which is, *Ore ne poet home ſes diſmes que
ſont hors de pariſſe; grant a que il voudra, car leveſque del lieu les avera.*
Hee grounded his opinion in this caſe upon the canon law, which is,
that the biſhop is to have all tithes growing in lands not aſſigned to
any pariſh within his dioceſſe. Yet this canon being againſt the law
of the land, never had allowance within this realme, for in ſuch part
of foreſts as are out of any pariſhes, the king ſhall have them. See
a notable record, term' Mich. an. 5 E. 3. *coram rege* Rot. 168.
Cumbria; adjudged for the king againſt the canon, and the opinion
of Herle. And this had been formerly reſolved in parliament,
*inter placita coram ipſo domino rege et ejus concilio ad parlament' ſua
poſt feſtum Sancti Hilarii, et etiam poſt feſtum Paſche, anno 18 E. 1.
fo. 8. int' episcopum Carliffe, et priorem ejusdem de decimis aſſartorum
vocat' Linthwavit et Kirketbavait in foreſta de Englewood.* The words
of which record are, *Quod decimæ prædictæ pertinent ad regem, et non
ad alium, quia ſunt infra bundas foreſte de Englewood, et quod rex in
foreſta ſua prædicta poteſt villas ædificare, eccleſias conſtruere, terras
aſſertare, et eccleſias illas cum decimis terrarum illarum pro voluntate ſua
cuicunque voluerit conferre, &c.* And E. 1. granted tithes comming
of land within the foreſt of Deane, as were not within any pariſh,
to the biſhop of Landaffe, and his ſucceſſors.

An Exposition upon the Statute entituled,
An Act for the true Paiment of Tithes.

Anno 2 E. VI. cap. 13.

THE noise of the dissolution of monasteries in the parliament holden in the 27 yeare of H. 8. (lay-men taking small occasions to withdraw their tithes) was the occasion of the making of the statute of 27 H. 8. c. 20. The principall cause of the making of the statute of 32 H. 8. cap. 7. was to inable lay-men, that had estates or interests in parsonages, or vicarages impropriate, or otherwise in tithes, to sue for subtraction of tithes in the ecclesiasticall courts, and to provide that no parson should be sued, or compelled to pay any manner of tithes for any mannors, lands, tenements, or hereditaments, which by the laws or statutes of this realme were discharged, or not chargeable for payment of any such tithes.

27 H. 8. ca. 20.
acc'. Vid. 31 H.
8. ca. 20. vers.
finem.

This act of 2 E. 6. is an act of addition, as by the words thereof hereafter following appeare.

Where in the parliament holden at Westminster the fourth day of February, anno 27 H. 8. there was one act made concerning paiment of tithes prediall, and personall: and also in another parliament holden at Westminster, 24 July, 32 H. 8. another act was made concerning true paiment of tithes, and offerings: in which severall acts, many and divers things be omitted and left out, which were convenient and very necessary to be added to the same. In consideration whereof, and to the intent the said tithes may be hereafter truly paid, according to the minde of the makers of the said act: bee it ordained and enacted, &c. that not onely the said acts made in the said 27 and 32 yeare of H. 8. concerning true paiment of tithes, and every article, and branch therein contained, shall abide and stand in their full strength and vertue: but also be it further enacted by the authority of this present parliament, that every of the kings subjects shall from henceforth truly and justly, without fraud or guile, divide (2), set out, yeeld, and pay all manner of their predial tithes (1), in their proper kinde, as they arise and happen, in such manner and forme, as hath been of right yielded and payd within 40 yeares (3) next before the making of this act, or of right or custome ought to have been paid (4). And that no person shall from henceforth (5) take or carry away any such or like tithes, which have been yeilded or payd within the said 40 yeares or of right ought to have been payd in the place or places tithable of the same, before he hath justly divided or set forth for the tithe thereof, the tenth

27 H. 8. ca. 20.

32 H. 8. cap. 7.

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part of the same, or otherwise agreed for the same tithes with the parson, vicar, or other owner, proprietary or farmer of the same tithes, under the paine of forfeiture of treble value of the tithes so taken or carried away.

(1) *Prediall tithes.*] This branch extends only to prediall tithes.

Pasch. 1 Ja. Rot. 1119. *in communi banco. Int. Booth et Southraie* in debt upon this statute by the parson of the church *pro non extrapositione decimarum pro caseo, vitulis, agnis, cerasis, volemis et pyris* to have the treble value, &c. The defendant pleaded *nihil debet per patriam*, and it was found against him. And it was moved in arrest of judgement that the said tithes of cheese, of calves, and lambes were no prediall tithes, and therefore not within this branch of the statute; and this act is penall, and shall not be taken by equity, *quod fuit concessum per totam curiam*. And it was resolved, *quod decimarum tres sunt species, quædam personales, quæ debentur ex opere personali, ut artificio, scientia, militia, negotiatione, &c. Quædam prædiales, quæ proveniunt ex prædiis, i. e. ex fructibus prædiorum, ut blada, vinum, fenum, linum, canabium, &c. seu ex fructibus arborum, ut poma, pyra, pruna, volena, cerasa, et fructus hortorum, &c. Quædam mixtæ, ut de caseo, lacte, &c. aut ex fructibus animalium, quæ sunt in pascuis, et gregatim pascuntur, ut in agnis, vitulis, hædis, capreolis, pullis, &c. Ex prædialibus sunt quædam majores, quædam minutæ. Majores, ut frumentum, sigilo, rixania, &c. fenum, &c. minores sive minutæ, quidam dicunt, sunt quæ proveniunt ex menta, aneto, oleribus, et similibus juxta illud dictum Domini, Luk. 11. vers. 42. Væ, qui decimatis mentam et rutum et omne olus, et præteritis judicium et charitatem Dei; hæc autem oportuit facere, illa non omittere. Alii dicunt quod in Anglia consistunt decimæ minutæ in lino quæ sunt prædiales, et lana, lacte, caseis, et in decimis animalium, agnis, pullis, et ovibus, decimæ etiam mellis et ceræ numerantur inter minutas, quæ sunt mixtæ. Vide Linwood cap. de decimis cap. Quoniam, fol. 140. verb. talibus decimis.*

Deut. 4. vers. 29.
Here is shewed
the true use
whereto tithes
should be im-
ployed.

The first ad-
dition.
Simile in the
same tearme in
the case of Webb
parson of Fret-
tenden in Kent.

And the Levite (to whom tithes were assigned) shall come, and the stranger, the fatherlesse, and the widow which are within thy gates shall eat and be filled.

(2) *Henceforth truly and justly without fraud or guile divide, &c.*] Trin. 44 Eliz. *coram rege*. In a prohibition between Walter Heale and John Sprat, the case was, Walter Heale set out his prediall tithes, and divided them justly from the 9 parts, and soone after carried the same away. Sprat sued for subtraction of the same in the ecclesiasticall court, Heale pleaded that hee had set them out *ut supra*, whereunto Sprat said, that presently after his setting out, &c. he carryed them away *in fraudem legis*. Adjudged that this was fraud and guile within this act, albeit he did justly devide the same within the letter of this law. It was further resolved, that if the owner of the corne before severance grant the same to another of intent that the grantee should take away the same to the end to defraud the parson, &c. of his tithe, this is fraud and guile within this statute.

Lib. Int. Coke
384.

(3) *Within forty yeares.*] This time of 40 yeares is here set downe because it is the usuall time for the prooffe *de modo decimandi*.

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(4) *Or of right or custome ought to have been yeelded, &c.*] The sense of these words [as hath been of right yeelded] is of tithes

tithes to be yeelded *in specie* within 40 yeares, and the sence of the words [or of right or custome] is, or by rightfull custome *de modo decimandi* ought to have been paid.

(5) *And that no person from henceforth, &c.*] Albeit this branch doth not give the forfeiture to any person in certaine, and therefore it was pretended that the forfeiture should be given to the king. And thereupon, upon this branch, the attourney generall, Hil. 29 Eliz. did exhibit an information in the exchequer against Wood of Cambridgeshire for this treble forfeiture for carrying away his tithes before they were justly divided. The defendant pleaded not guilty, and by a jury at the barre he was found guilty, and in arrest of judgement it was moved that in this case the forfeiture was not given to the king, for that the words of the act be, under the paine of the forfeiture of the treble value of the tithes so taken away. And whensoever a forfeiture is given against him that doth dispossesse, &c. the owner of his property, as here he doth of his tithes, there the forfeiture is given to the party grieved or dispossessed, and the rather for that this is an additionall law, as hath been said, and made for the benefit of the propriator of the tithes. And so it was adjudged by Sir Roger Manhood and the whole court of the exchequer Pasch. 29 Eliz. And this was the first leading case, that was adjudged upon this point, and ever since it hath been received for law, and the party interested in the tithes doth in an action of debt recover the treble value. And so it was also adjudged Hil. 40 Eliz. Rot. 699. where Rob. Bedell and Sarah his wife in the right of his wife joyned in an action of debt for the treble forfeiture. A record well examined and adjudged, and worthy to be a precedent. In which case it was resolved that the generall allegation in the count, that the defendant *anno 38 Eliz. grano seminavit 20 acras terræ, &c. et quod decimæ inde attingunt ad valorem 150l.* without shewing what kind of graine, was good.

The second addition.

And be it also enacted by the authority aforesaid, that at all times whensoever, and as often (6) as the said prediall tithes shall bee due at the tithing time of the same, it to be lawfull to every party to whom any of the said tithes ought to be paid, or his deputy or servant to view and see their said tithes to be justly and truly set forth and severed from the nine parts, and the same quietly to take and carry away. And if any person carry away his corne, or hay, or his other prediall tithes before the tithe thereof be set forth, or willingly withdraw his tithes of the same, &c. that then upon due prooffe thereof made before the spirituall judge, or any other judge, to whom heretofore he might have made complaint, the party so carrying away, withdrawing, letting, or stopping shall pay the double value (7) of the tenth, or tithe so taken, lost, withdrawn, or carried away, over and besides the costs, charges, and expences (8) of the suit in the same, the same to be recovered before the ecclesiasticall judge, according to the kings ecclesiasticall lawes.

The third addition.

Mich. 9 E. 2.
fol. 61. in libro
meo.
Labbe de Ofneis
case. 19 R. 2.
action sur le case,
c2. 17 H. 6.
Jurisdiction, 58.
So resolved by all
the judges of
England, Pasch.
4 Jac.
Vide Artic. cleri
4 Jac. Artic. 16.
* [651]

(6) *That at all times whensoever, and as often, &c.*] The first part of this branch is declaratory of the common law, because for the stopping of his way, &c. an action of the case did lye at the common law.

(7) *Shall pay the double value, &c.*] The reason why the double value, &c. is by this branch to be recovered in the ecclesiasticall court, where by the former branch, the parson, &c. at the common law shall recover the treble, is, * for that in the ecclesiasticall court hee shall recover the tithes themselves, and therefore the value recovered in the ecclesiasticall court is equivalent with the treble forfeiture at the common law.

(8) *Besides the costs, charges, and expences, &c.*] So as the suit in the ecclesiasticall court is more advantageous then the suit for the treble forfeiture at the common law: for at the common law he shall recover no costs, but he shall recover in the ecclesiasticall court costs and expences. But then it is demanded, whether in an action of debt for the treble value at the common law, if the plaintiffe be nonsuite, or if the verdict passe for the defendant, the defendant shall recover his costs by the statute of 23 H. 6. c. 15. And the answer is, that in that case he shall recover no costs, and so it was adjudged. Trin. 43 Eliz. *in communi banco, inter* Dounton plaintiffe in debt upon this statute, and S. Moile Finch defendant, that this action of debt is no action of debt within the statute of 23 H. 8. because it is neither upon a specialty or by contract; neither is this action upon this statute any action for wrong personall immediately done to the plaintiffe, for it is a *non-sesance, viz.* a not-setting out of the tithes, Trin. 42 Eliz. *in communi banco* adjudged in an action of debt for the treble value upon this statute, not guilty, or *nihil debet* are good uses, and so upon the statute of 5 Eliz. upon perjury.

The fourth
addition.

And be it further enacted, &c. that all and every person which hath or shall have any beasts or other cattel tithable (9), going, feeding, or depasturing in any waist or common ground, whereof the parish is not certainly knowne, shall pay their tithes for the increase of the said cattel so going in the said waist or common to the parson, vicar, proprietary, portionary, owner or other their farmours or deputies, of the said parish, hamlet, towne, or other place, where the owner of the said cattell inhabiteth, or dwelleth.

Rot. parl. 18 E.
1. fol. 8. Int.
Episcopum Car-
liel. & decan.
22 aff. p. 75.

(9) *All and every person which hath or shall have any beasts or other cattel tithable, &c.*] Where the king ought to have the tithes within the waists or commons in his forests, which are not within any parish, this branch giveth the tithes of the increase of cattle to the parson of the parish where the owner dwelleth.

The fifth
addition.

Provided, &c. that no person shall be sued, or otherwise compelled to yield, give, or pay, any manner of tithes for any manours, lands, tenements, or hereditaments, which by the lawes (10), and statutes (11) of this realme or by any priviledge or prescription (12) are not chargeable with the payment of any such tithes (13), or that be discharged by any composition reall (14).

(10) *By*

(10) *By the lawes of the realme, &c.*] (and so speaks the statute of 32 H. 8. cap. 7.) That is, by the common lawes and customes of the realme, *terræ sunt indecimabiles*: hereof you may read divers examples lib. 8. fol. 48, 49, 81.

Note, that tithes shall not be payd of any thing that is of the substance of the earth and are not annuall, as of quarries of stone, turfe, flagges, tynne, lead, brick, tyle, lyme, marle, coales, chalke, pots of earth, and the like, nor of beasts that be *feræ natura*, as deere, &c. nor of agistment of such beasts, as the parson hath tithe of, nor of cattle that manure the ground; but of barren beasts he shall have tithe for agistment, or herbage of them, unlesse they be nourished for the pale or plough, and so employed. Mich 41 & 42 Eliz. *coram rege* in prohibition *int.* Greene & Hull. & Mich. 37 & 38 Eliz. *inter* Grisman & Lewes *in communi banco*. Nor of rakings left without covin, nor of after pasture. No tythes shall bee payd for *sylva cædua* employed to hedging or for fewell, for maintenance of the plough or pale. Nor for the herbage of meres, bowkes, nor fearne, locks of wooll, or stubble, &c. but are freed thereof by the common law and custome of the realme. *Vide* Hil. 8 Jac. *coram rege* Tho. Baxters case. And in that case it was resolved and adjudged, that a parson shall not have two tithes of one land in one yeare, as of corne, and of the stubble or herbage, of hay, and of the after-pasture, *et sic in similibus*. But if the soyle of an orchard be sowne with any kinde of graine, the parson shall have tithe of the fruit trees and of the graine, for they be of severall and distinct kindes. But if he pay tithe for the fruit of the trees, and after cut downe the trees, and sell them in billet, or faggot, he shall pay no tithe, for they bee not of severall kindes.

If a man pay tithe for his corne, and after grindeth the same corne at a mill within the same parish, no tithe meale shall be payd therefore. *Vide Artic⁹ Cleri.* cap. 2.

Decimam partem separabis de cunctis fructibus quæ nascuntur in terra per annos singulos, &c. Decimam frumenti tui, et vini, &c. Thou shalt tithe all the increase of thy seed that the field bringeth forth yeare by yeare, as of corne, wine, &c.

Register 54. b. F.N.B. 53. E. Brooke Dismes. 16.

All canons and constitutions made against the lawes &c. of the realme are made void.

(11) *By the statutes, &c.*] *Viz.* 27 H. 8. cap. 20. 31 H. 8. cap. 13. 32 H. 8. cap. 7.

(12) *By prescription.*] The orders of *Cistercienses, Templarii, et Hospitalarii decimas prædiorum suorum, quæ propriis manibus aut sumptibus excolunt, non tenentur solvere, &c.* *Vide* Dier, 10 Eliz. fol. 277, 278. & 2 H. 4, 5. cap. 14.

This priviledge to these three orders of religion was granted to them by the counsell of Lateran, *anno Domini* 1215. & *anno* 17. *Johannis regis*, and was allowed by the generall consent of the realme, but this priviledge extendeth only to the lands which they had before that generall counsell.

Pope Innocent the third by his bul discharged those of the order of Premonstratenses of the payment of tithes of such lands as were of their owne manurance, or other improvement. Note, about the yeare of our lord 1150. most of all religious orders were exempt from payment of tithes out of their possessions kept in their owne hands. Which pope Adrian the fourth about that time restrained

So resolved;
Mich. 21 & 22
Eliz. *coram rege*
per Wray chiefe
justice & totam
curiam. F.N.B.
53. g. Regit. 54.
b. Rot. parl. 51
E. 3. nu. 57.
7 H. 12 H. 8.
4. b. 4. nu. 105.

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Deut. 14. vers.
22, 23.

25 H. 3. cap.
19.

Innocent the 3.
in epist. decretali.
lib. 1. pag.
262. Vid. 38 E.
3. 6. a.

to *Cistercienses, Templarii, et Hospitalarii*, and that all other orders should pay tithes, &c.

2 H. 4. cap. 4.

By the statute of 2 H. 4. not only the Cistercienses, but all other religious and seculars which put any bulls in execution for discharge of tithes of their lands in the hands of their farmours should be in danger of a premunire.

28 H. 8. cap. 16.

Vid. 25 H. 8.
cap. 21.

Vid. 11 H. 4. 76.

12 H. 8. 5, 6.

By the statute of 28 H. 8. it is enacted that all bulls, briefes, faculties, dispensations, of what names, natures, or qualities whatsoever they be of, heretofore had or obtained of the bishop of Rome, or of any of his predecessours, or by authority of the sea of Rome, by or to any subjects, residents, or bodies politique or corporate of or in this realme, or of or in other the kings dominions, should from thenceforth be clearly voyde, and of no value, force, strength, nor vertue, and should never after that act be used, admitted, allowed, pleaded, or alledged in any places or courts of this realme or any other the kings dominions, upon paine contained in the statute of premunire, &c. This is a generall law, and plenarily and strictly penned against all bulls, &c. True it is, that there are some exceptions or qualifications in the act, which you may read there; but there is no exception or qualification therein for any dispensation or discharge of not payment of tithes by any bull of the pope. And we are of opinion, that the pope by his bull could not discharge any subject of this realme of payment of tithes, for it should be against the liberty of the subject, when he had liberty to grant his tithes to what spirituall person he would, and against the right of the persons, &c. of parishes, after parochiall rights were established.

Premunire.

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Vid. Dier 10

Eliz. 277, 278.

Vid. 25 H. 8.

cap. 19.

Vid. 18. Eliz.

Dier. fol. 347.

Westons case.

Extr. tit. de Ec-

cl. edific. cap. 4.

De his Lindwood

fol. 35. verb.

reparat.

Extr. tit. de of-

f. c. judicis ordi-

nar. cap. 4. cum

vos. Lindwood

fol. 121. verb.

legitima. Rot.

Clau. 30 H. 5.

m. 4. in turri

Lond. Pat.

13 E. 1. m. 11.

ib. de monitura

episcopi Hil.

2 E. 2. in mem.

Scaccarii. Tr.

36 E. 3. ib.

proces. vers.

episcopum,

Cestr. Hil. 5 E.

4. int. com-

munia Rot. 47.

Larcheveque de

Yorkes case.

a Regid. 38.

F.N.B. 41. g.

8 E. 4. 24.

18 H. 6. 14.

b Doct. & Stud.

174.

This act of 28 H. 8. extendeth not to general councillis, but leave them as they were befoie, but all canons (as elsewhere hath been said) which are against the prerogative of the king, the common law or custome of the realme, are of no force. Let not therefore only serjants, apprentices, and attourneys, but the parties themselves be well advised how they plead or alledge any bull, briefe, faculty, or dispensation from Rome, &c. which is not warranted by this act, the punishment being so penall as a premunire, if they plead or alledge any bull, &c. against that act.

And in some cases, this maketh for the clergy. By the canon law parish churches are to be repaired by the parsons of the parish, but the custome of this realme being that the parish churches are to be repaired by the parishioners or inhabitants of the parishes, this canon bound not the clergy.

Also by another canon, neither arch-bishop nor any other of the clergy could by their testament bequeath any thing wherein he had property in the right of his church; but this being contrary to the custome of the realme originally obtained by the bishops of this realme for themselves and their whole clergy, for which at this day a recompence is given to the king, as elsewhere we have shewed.

(12) ^a *Prescription.*] As *modus decimandi*, lands given in satisfaction, &c. ^b And a country may prescribe to be quit of tithes, or in *non decimando*. But for the better understanding both of this statute, and of our books, it is good to be knowne what the time of prescription for tithes is by the canon law, and by what authority. And the time for prescription in that case is forty yeares, by which time of prescription a spirituall person may gaine by the canon

canon law a right of tithes in another parish, &c. * And this prescription hath this ground and warrant by a decretall epistle of pope Alexander the third, *anno Domini* 1180. But this canon being against the common law which alloweth no prescription unless it be time out of mind of man, never had allowance in England.

* Of prescription according to the common law, you may read in the first part of the Institutes sect. 170. at large. And the epistle decretall of pope Alexander we have thought good to recite *in hæc verba*, Alexander Mauricio episcopo: *Ad aures nostras te significante pervenit, duas ecclesias sæpius sub examine tuo litigare super decimis, quas una ecclesiarum in alterius parochia 40 annis possedit, ac per hoc petit ejus actionem extantam, altera vero volens eas jure parochiali evincere præscriptionem non debere sibi obesse proponit; ideo quid juris sit in hoc casu tua nos duxit fraternitas consulendos. Tuæ itaque fraternitati literis præsentibus innotescat, quod jure * divino et humano melior est conditio possidentis, quoniam * quadragenalis præscriptio omnem prorsus actionem secludit.*

* Mich. 43 & 44 Eliz. In a prohibition between Nowell and Hicks vicar of Edmonton in Midd. the plaintiffe in the prohibition alledged a custome within the said parish of Edmonton time out of mind of man to pay for every lambe a penny, &c. And issue was taken upon the custome, and the jury found, &c. before twenty yeares last past time out of mind, that there was within the said parish such a custome, and *modus decimandi*; but for twenty yeares last past by reason of suits and troubles, the inhabitants of the said parish had payd tithe lambs in kinde. And in this case these two points were adjudged. First, when a custome doth create an inheritance, this cannot be waved or adnulled by payment or other matter *in pais*. 2. Albeit that the *modus decimandi* had not been yeelded or payd by twenty yeares, yet the prescription may be generall, for that the custome once established doth continue. As if a man hath a common of pasture, &c. and taketh a lease of the land, &c. for many yeares, yet after the yeares ended he may prescribe generally; for the inheritance of the common continued: and if the law should be otherwise, it were dangerous for the parties that doe prescribe for one yeare, and tenne or twenty yeares, &c. is all one in judgement of law. And so herewith doe agree the books in 15 E. 3. tit. judgement 133. in a writ of mesne. 14 E. 3. *ibidem* 155.

Edmundus de mortuo mari attachiatus fuit ad respondendum Johanni de Segrave et Christianæ uxori ejus, quare impedit eos habere liberam chaceam in bosco suo de Kinkefwood pertinen' ad manerium suum de Stotesden quod tenent de rege in capite, et quod habent ex feoffamento Hugonis le Plessye quondam domini dicti manerii. Edmundus dicit quod Rogerus pater suus obiit seifitus inde tenend' in suo seferali, et quod prædictus Hugo tempore quo feoffavit prædictos Johannem et Christianam de dicto manerio, non fuit seifitus de dicta chacea. Et de hoc ponit se super patriam, et præd' Johannes et Christiana similiter. Jur' dicunt quod Johannes de Plessy pater prædicti Hugonis de Plessy fuit seifitus de prædicta chacea dum fuit dominus dicti manerii, et dicunt quod dictus Hugo voluit ibidem fugasse, postquam prædictum manerium pervenit ad manum suam, set Rogerus de mortuo mari ipsum impedit et non permisit. Et dicunt quod Hamo le Strange, et Hugo de Turber-vile parentes uxoris ipsius Hugonis ex rogatu ipsius Hugonis venerunt ad manerium de Stotesden, et prædictam chaceam simul

c 20 H. 6. fol. 17. ac. precription per le ley de St. Eglise est 40. ans, et en nostre ley nest valent. precrip. per C. ans. 2 E. 4. 15. 6 E. 4. 3. d 1. part. Institutes, sect. 170.

* Jure Canonico.
* This is the ley de St. Eglise mentioned in 20 H. 6.
c Mich. 43 & 44 Eliz. coram rege.

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Mich. 13 E. 1. in banco Rot. 119. Salop. Free chase appendant al manor. Issue, non fuit seifitus. Verdict.

Multiplex interruptio non tollit præscriptionem semel obtentam. Note an interruption to chase is no disseisin thereof, but at the will of the owner. Judgement. Seisina bona debet esse pacifica. Mich. 2 E. 2. coram rege. Warw. in mon- straverunt.

simul cum prædicto Hugone intraverunt nomine ipsius Hugonis cum equis et armis, et in ea cum equis et armis per tres dies fugaverunt absque impedimento prædicti Rogeri de mortuo mari aut hominum suorum. Et quesit' jur' &c. dicunt quod illud fecerunt tempore pacis, et absque impedimento prædicti Rogeri aut hominum suorum eo quod dictus Rogerus nescivit quod ibi fugaverunt, et quod ab eo tempore dictus Hugo nunquam fugavit ibi; quia quotiescunq; fugare ibidem voluit, dictus Rogerus ipsum impedivit. Postea term' Trin' anno 20 venerunt partes, et petierunt judicium suum per attornatos suos. Judicium redditum, quod quia Johannes de Plessy fuit de chacea seistus tanquam pertinen', &c. Et postea dictus Hugo per tres dies continue tempore pacis seisinam suam obtinuit absque impedimento Rogeri de mortuo mari, aut alicujus paren' suorum, per quod videtur cur' quod seisina illa est sufficiens, bona, et pacifica in hoc casu; consideratum est, quod Edmundus injuste impedivit dictos Johannem et Christianam de prædicta chacea, et ipsi re' chaceam illam et dampn' 100 s.

The mannour of Brimsgreen and Norton was ancient demesne, and in the kings hands, and William of Brimingham and his ancestors time out of minde and before the conquest had taken toll aswell of the tenants of the said mannour as of others, whereupon judgment was given, as it appeareth in the record in these words: *Et quia manifeste constat, &c. quod manerium de Brymmeßgreen et Norton est de antiquo dominico coronæ Angliæ, et à tempore quo non extat memoria, extitit in seisina progenitorum reg' quondam regum Angliæ, et adhuc in seisina domini regis nunc existit. Et homines de eodem manerio sicut et cæteri homines de antiquis dominicis coronæ domini reg' quieti esse debeant à præstatione theolonii per totum regnum Angliæ, ut prædictum est, &c. Et super hoc viso et lecto recorde placiti prædicti manifestè patet quod prædict' Willielmus de Brimingham recognovit quod ipse et antecessores sui habuerunt mercatum in prædicta villa de Brimingham, et theolonium de omnibus mercandis in eadem villa, de quibus theolonium præstari deberet, perceperunt et habuerunt, et etiam de hominibus de Brimsgreen et Norton, quam de aliis ibidem vendentibus et ementibus ante Conquestum, et sine temporis interruptione, et quod ipse statum eorundem antecessorum continuavit distringendo et percipiendo ab eisdem hominibus theolonium, tam pro minutis, ut pro victualibus et aliis necessariis suis, quam de aliis quibuscunque mercandis sicut de aliis mercatoriis. Consideratum est quod prædicti Richardus, Robertus, Johannes, et omnes alii de manerio prædicto, quieti sint imperpetuum à præstatione theolonii in villa prædicta præstandi secundum legem et consuetudinem in regno usitat', et quod recuperent damna, quæ taxantur per discretionem justiciarii ad vigint marc'. Et prædictus Willielmus pro injusta continuatione, usurpatione antecessorum suorum in misericordia. Et inhibitum est eidem Willielmo ne homines de manerio prædicto de cætero distring' ad theolonium in dicta villa de Brimingham præstand' contra legem et consuetudinem prædictas, &c.*

Abbas de Sancto Edmundo implacitat Rogerum de Bigod com' Norff' marefc. Angl', et duos alios pro captione duorum leporariorum suorum in villa de magna Thorpe. Comes dicit, quod dicta villa est infra præcinctum demid' hundredi sui de Ersham quod tenet ingarennatum prout Rogerus avunculus suus, cujus hæres ipse est, illud tenuit, et quia invenit prædictum abbatem ibidem fugantem, ipse cepit, &c. Abbas dicit quod ratione terrarum suarum ibidem ad ipsum pertinet fugare, prout omnes prædecessores sui ibidem fecerunt, &c. Ideo ven' jur' qui per speciale veredictum dicunt, quod abbas et prædecessores sui solebant ante bellum de

Leves

Nota, ante Conquestum. Note a possession beyond time of memory shall not stand, but give place to law. Consuetudo licet sit magnæ auctoritatis, nunquam tamen præjudicat veritati.

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Trin. 18 E. 1. banco rot. 50. Norff. Nota pro leporariis. Ingarennatum pertinet fugare. Verdict speciall. Bellum de Lewes 48 H. 3. anno Domini, 1264.

Leaves ibidem semper fugare. &c. Et dicunt quod tam Rogerus comes, quam Rogerus nunc ipsum abbatem et homines suos sæpe impediuit ibidem fugare, et leporarios suos surripuerunt.

(13) Not chargeable by payment of tithes, &c.] As by unity of possession. lib. 2. fol. 46, 47, 48, 49. lib. 11. fol. 10, 11, 14, 16.

(14) Discharged by any composition reall, &c.] Either before time of memory, or within time of memory, that is by parson, patron, and ordinary. *Vide* 3 H. 6. 22, 23. 9 H. 6. 17. 41 E. 3. 27. 17 E. 3. 11. 38 E. 3. 6. 8. 12 H. 4. 13. 19 H. 6. 75. 32 H. 6. 4. 34 H. 6. 36. 31 H. 6. 28. 35 H. 6. 5. a. 37 H. 6. 25. 1 E. 4. 6. 8 E. 4. 14. 18. 14 H. 7. 3. 26 H. 8. 7. 27 H. 8. 20, 21.

*Concordia facta inter Willielmum Mallet et rectorem ecclesiæ de Aure beiton Bathon, et Wellen' diocef' ex una parte, et * nobilem virum Johannem de Acton mil' ex altera parte, de * modo decimandi omnia infra parochiam de Aure per consensum episcopi et capitul' Bathon' unde placit' fuit prius in curia Cantuar'. Nota.*

Mich. 9 E. 1. in banco rot. 63. Somerset.
* Miles est nobilis.

* Modus decimandi per realem compositionem. The fifth addition, with a proviso.

Provided, &c. that all such barren (15), heath (16), or wast (17) ground, other then such, as be discharged for the payment of tithes by act of parliament, which before this time have lyen barren and payd no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and tearme of seven yeares, next after such improvement fully ended and determined, pay tithe (18) for the corne and hay growing upon the same, any thing in this act to the contrary in any wise notwithstanding.

(15) Barren.] *Terra sterilis ex vi termini est terra infœcunda, nullum ferens fructum. Virgil. Infelix lolium, et steriles dominantur avenæ.*

But it is not only so strictly taken in this act, but hath also a more restrained sense. For albeit it doth yeeld some fruit, yet if it be barren land, *quoad agriculturam*, as to tillage, which this branch meant to advance, it is within this act, for albeit barren ground (as to tillage) doth pay tithe wooll and lambe, yet is it within this act, and this appeares by the next proviso in this act for the payment of such tithe as during the seven yeares before the improvement was payd. But yet if the ground be not apt for tillage, yet if it be not *suapte natura* barren, it is not within this act. As if a wood be stubbed and grubbed, and made fit for the plough, and employed thereunto, yet shall it pay tithes presently, for wood-ground is *terra fertilis, et fœcunda*.

Dier, 2 Eliz. fol. 170, 171. lib. Int. Coke 462, 463.

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6 E. 6. ex libro Bendloes.

*Devenere locos lætos, et amœna vireta
Fortunatorum nemorum, sedesq; beatas.*

Virgi *Æneid*.

And so was it resolved Hil. 9 Jac. reg. upon the motion of Serjent Houghton by the whole court of common pleas.

In a prohibition between Sharrington and Fleetwood for tithes in Orwell in the county of Lancaster, it was resolved, that if marish meadow, or other land for not cleansing of the trenches or sewers, or by suddaine accident or inundation of waters be surrounded; or by ill husbandry or unprofitable negligence any land become over-

Hil. 38 Eliz. com. ram reg.

runne

runne with bushes, furres, whinnes, and bryers, yet are not they or any of them said to bee barren land within this statute, because of their owne nature they are fruitfull, and the parson, &c. shall not by this act be barred of his tithes by the ill husbandry or negligence of the owner or possessor.

(16) *Heath.*] In French it is called *bruyere*; in legall Latin *brucra*, Regist. 2. In domesday it is called *bruaria*; *Latine erix*, *erica* an unprofitable kinde of ground, but wholly barren, for thereon sheep and beasts will bruise, and some poore people the flags and turfs thereof doe apply to fewell; and this heath cannot without great skill, charge and industry bee converted to tillage. It sendeth forth a flower in autumnne (when all others cease) which bees doe exceedingly covet, as it is said, this is within this act. Some say, *est quoddam genus myricæ*, a kinde of wilde tameriske, and in Lincolnshire a litle religious house was called Temple bruer, because it was feated in the heath.

Lib. Intr. Coke
ubi supra.

Lib. Intr. Coke
ubi supra.

(17) *Wast.*] It is called *vastus fundus*, wast ground, because it lyeth as wast with little or no profit to the lord of the mannour, and is so called to distinguish it from the residue of the demesnes in the lords hands, and cannot without great charge and industry be improved or converted to tillage being *suapte natura* unprofitable, and being converted to tillage it shall pay no tithes by the space of seven yeares.

(18) *Shall after the end and terme of seven yeares next after such improvement pay tithes.*

Dier, 2 Eliz.
170. b.

Note, here are no expresse words of discharge of the tithes during the seven yeares, but by reasonable construction it doth impliedly amount to a discharge during the seven yeares, and the seven yeares are to be accounted next after the improvement.

The sixth addition with the proviso.

And be it enacted, &c. that every person exercising merchandizes, bargaining, and selling, clothing, handicraft, or other art or faculty, being such kinde of persons as heretofore within these forty yeares have accustomedly used to pay such personall tithes, or of right ought to pay (other then such as bee common day-labourers) shall yearly, &c. pay for his personall tithes, the tenth part of his cleare gaires (19), his charges, &c. deducted; and where handicrafts men have used to pay their tithes within this forty yeares, the same custome of payment of tithes (20) to be observed. And if any person refuse to pay his personall tithes, &c. it shall be lawfull to the ordinary of the same diocese, &c. to call the same party before him, and by his discretion to examine him by all lawfull and reasonable meanes other then by the parties owne corporall oath (21), concerning the true payment of the said personall tithes.

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(19) *Pay for his personall tithes the full tenth part of his cleare gaires, &c.*] Of personall tithes we have spoken before. Vid. 37 H. 8. cap. 12. Vid. Linwood, tit. de Decimis, fol. 141, 142.

(20) *Custome of payment of tithes.*] Nota, there may be *modus decimandi* for personall tithes.

(21) *By all lawfull and reasonable meanes, other than by the parties owne corporall oath.*] Here is just occasion offered to speake of *juramentum*.

juramento calumnie, wherein we will endeavour to find out three things: first, the beginning of the bringing in of this oath: secondly, how the law hath stood therein in former ages: and thirdly, what the right is at this day.

By a constitution *domini Osbonis diaconi cardinalis Sancti Nich. apostolicæ sedis legati*, at a provinciall councell. holden octob^r Sancti Martini in ecclesia Sancti Pauli London, an. Dom. 1236. anno 21 H. 3. it was ordained in these words: *Ius-jurandum calumnie in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quout veritas facilius aperiatur, et causæ celerius terminentur, statuimus præstari de cætero in regno Angliæ, secundum canonicas et legitimas sanctiones obtentas, consuetudine in contrarium non obstante.* By this it appeareth, that by the custome of the realme of England, *juramentum calumnie* was not to be ministred: but to confesse the truth, the custome was not so generall, as in this canon is alledged; for lay-men were free by the custome of the realme for taking of that oath, unlesse it were *in causis matrimonialibus et testamentariis*: and in those two cases the ecclesiasticall judge might examine the parties upon their oath, because contracts of matrimony were often made in private, and legitimation of children depended thereupon. And in causes testamentary many things consist in secrecie, and the truth therein is to be drawn out by oath, *et interest reipublicæ testamenta hominum rata haberi.* And this appeareth by a * prohibition by authority of parliament directed to the sherifes, &c. *Quod non permittant quod aliqui laici in baliva sua in aliquibus locis convenient ad aliquas recognitiones p. sacramenta sua facere, nisi in causis matrimonialibus et testamentariis.* But this custome extended not to them of the clergy, but to lay-people only, for that they of the clergy being presumed to be learned men, were better able to take *juramentum calumnie*: for concerning the testimony of witnesses in the ecclesiasticall court, that act, or the custome of the realme extends not unto.

rot. 285. in communi banco. Hill. 7 H. 6. rot. 135. ibid. Trin. 3 H. 6. rot. 41. ibid. 19 E. 4. 10. per Brian, that it is a statute. 20 E. 4. 3. b. ^a Regist. fol. 36. b. F.N.B. 53. d. A prohibition, and thereupon an attachment, contra consuetudinem regni, but there is a consultation for witnesses. Fitzh. justice of peace 72. Lamb. justice of peace, 338.

But if in a penall law the jurisdiction of the ordinary be saved, as by 1 Eliz. ^b for hearing of masses, or by 13 Eliz. ^c for usury, or the like, neither clerke nor lay-man shall be compelled to take *juramentum calumnie*, because it may be an evidence against him at the common law upon the penall statute.

Leighs case, Habeas corpus. ^c 18 Eliz. Dyer 175. in margine, Hindes case, Habeas corpus.

But it is objected, that this oath hath long continued in the ecclesiasticall court. To this it is answered: First, that it had the warrant of an act of parliament (as it was holden) in 2 Hen. 4. cap. 15. whereby it was enacted, *Quod diocesanus per se, vel commissarios suos contra hujusmodi personas, &c. ad omnem juris effectum publice, et judicialiter procedat et negotium hujusmodi terminet juxta canonicas sanctiones.* By this statute, and the said provinciall constitution, and other the canons of the church, the diocesans, &c. ministred the said oath, even in the case of heresie, &c. This statute of 2 H. 4. was repealed by the act of 25 H. 8. (which act is partly declaratory of the ancient law of the realme) in these words: "It standeth not
" with the right order of justice; nor good equity, that any person
" should

* Prohib. format' super Artic' Cleri, tit. Prohib. Rastail 4. vet. Magn. Chart. 2. part. fol. 70. a. Vid. assise Clarendon, 10 H. 2. Bilt. fol. 35. b. acc' Hill. 7 E. 3.

^b Dyer manuscript, propria manu, Trin. 9 Eliz. in communi banco.

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25 H. 8. cap. 14. & 1 E. 6. cap. 12.

This statute of 2 H. 4. was revived in an. 1 & 2 Phil. & Mar.

ca. 6. and repealed again an.
1 Eliz. 1. & so remaineth.

“ should be convict, and put to losse of life, good name, or goods,
“ unlesse it were by due accusation and witnesse, or by present-
“ ment, verdict, confession, or processe of outlawry, &c. And
“ that it is not reasonable, that any ordinary, upon any suspicion
“ conceived of his owne fantasie, without due accusation or pre-
“ sentment should put any subject of this realm in any infamy and
“ slander of heresie, to the perill of life, or losse of name, or
“ goods.” And in a former clause of the said act it is said:
“ That the most expert and best learned man of this your realm,
“ diligently lying in wait upon himselfe, can eschew and avoid
“ the penalties and dangers, &c. if he should be examined upon
“ such captious interrogatories, as is, and hath been accustomed to
“ be ministred by the ordinaries of this realme, in cases where they
“ will suspect any man of heresie, &c.

Secondly, the words of the said act of parliament are *contra voluntatem eorum*, and of the Register, *ipsis invitis*; so as such as willingly have taken it, serveth for no possession against the law.

3. But now lastly it is to be seen, how the right standeth touching this oath at this day. It is confessed, as before it appeareth, as well by the said provincial constitution of Otho, as by the Register, that the said constitution was *contra consuetudinem regni*, whereupon it followeth, that no custome of the realme can be taken away by a canon of the church, but only by act of parliament, and specially in case of an oath, which is so sacred a thing, and which generally concerneth all the nobility, gentry, and comminallty of the realme of both sexes. And by the statute of * 25 Hen. 8. cap. 19. no canon against the kings prerogative, the law, statutes, or custome of the realme, is of force, which is but declaratory of the common law.

Vid. the third part of the Institutes, cap. Perjury.

* 25 H. 8. ca. 19. Rot. pat. an. 15 E. 2. part 1. m. 8. 19 E. 3. quare non admittit 7. 10 H. 7. fo. 6. per Brian.

See the fourth part of the Institutes, cap. The Court of Convocation.

d Doct. Cofin in his book intituled, An Apology, &c. cap. 13.

“ Wee have read over what Doctor Cofin hath in his book spoken for the maintenance of this oath, and certainly, he toucheth not the state of the question, as will appeare to the learned reader.

To conclude: This branch of 2 Ed. 6. giveth no life to any forcelesse canon, which is against any law or custome of the realme, but, according to the law and custome of this kingdome prohibiteth the ordinary in case of personall tithes to examine the party upon his corporall oath; for the parliament did take that to be no lawfull and reasonable meanes (whereof it speaketh); for a parliament would never have prohibited any thing that was lawfull and reasonable; and yet the cleare gains of merchants, clothiers, or handicraft men do lye in great secrecie, and hardly to be proved by witnesses. And before, in the clause concerning the second addition, for recovery of predial tithes, it is said; upon due prooffe thereof, made before the spirituall judge, &c. for that they are open, visible, and easie to be proved by witnesses: and at this time the statute of 2 H. 4. stood repealed.

No person ecclesiasticall or temporall ought in any ecclesiasticall court to be examined upon the cogitation of his heart, or what hee thinketh, &c. as it was holden by the judges in the parliament holden 4 Jac. and as it was after holden in the court of common pleas, Mich. 6 Jac. in Doctor Wolstons case in a prohibition.

L. 18. F. de pœna. Cogitationis pœnam nemo meretur.

Provided, &c. that all and every person and persons, which by the lawes or customes of this realme ought to make or pay their offerings, shall yearly from henceforth well and truly content and pay his or their offerings (22) to the parson, &c. of the parish or parishes, where it shall fortune or happen him or them to dwell or abide, &c.

(22) *Offerings.*] Offerings or oblations, *oblaciones*, these are of two sorts, viz. free or voluntary, and consuet; or by custome, as here it appeareth. Offerings and obventions are in London the profits of the church, and not in corn, or other manner.

A writ of right of advowson brought of the fourth part of the tithes and offerings of the church of Saint Dunstan in the West in Fleetstreet London, and adjudged to be good.

See lib. 11. fol. 16. Doctor Grants case. Vid. there for obventions, 38 E. 3. 13. and 16 E. 3. ubi sup. and see here the 10 addition. Vid. the next addition.

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30 E. 3. 1. in account.
38 E. 3. 13. per Finch. acc.
16 E. 3. quare Imped. 147.

Provided, &c. That this act, or any thing therein contained, shall not extend to any parish, which stands upon and towards the sea coasts, the commodities, and occupying whereof consisteth chiefly in fishing, and have by reason thereof used to satisfie their tithes by fish, but that all and every such parish and parishes shall hereafter pay their tithes, according to the laudable customes, as they have heretofore of ancient time within these 40 yeares used and accustomed, and shall pay these offerings, as is aforesaid.

Provided that this act, &c. shall not extend in any wise to the inhabitants of the citie of London and Canterbury, and the suburbs of the same, ne to any other towne or place, that hath used to pay their tithes by their houses, otherwise then they ought or should have done before the making of this act, any thing in this act to the contrary in any wise notwithstanding.

Mich. 5. Jac. *in communi banco*, between John Skidmore and Robert Eire plaintifes in a prohibition against John Bell parson of Saint Michael Queenhithe in London: the case upon the said statute of 37 H. 8. and the decree thereupon was this: the said parson libelled before the chancellor of London for the tithes of an house, called the Bores Head in Breadstreet in the said parish, by force of the said act and decree, the ancient farme rent whereof was five pounds, at the time of the said decree, and after, and that of late a new lease was made of the said house, rendring the rent of five pounds *per annum*, and over that a great in-come or fine, which was covenanted and agreed to be paid yearly at the same day; that the rent was paid as a summe in grosse, and that so much rent might have been reserved for the said house, as the rent reserved, and the summe in grosse amounted unto; which reservation and covenant, &c. were made to defraud the said parson of the tithes of the true rent of the said house, which to him did appertain by the purport and true intention of the said decree. And in this case foure points were resolved by the whole court.

II. INST.

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First, if so much rent be reserved as was accustomed to be paid at the making of the said decree in 37 H. 8. (whatsoever fine or in-come be paid) that the parson can averre no covin; for the words of the decree be; Where any lease is or shall be made of any dwelling house, &c. by fraud or covin in reserving lesse rent then hath been accustomed, or is paid, &c. So as if the accustomed rent be reserved, no fraud can be alledged; for the fraud by the decree is, when lesser rent then was then accustomed to be paid, is reserved; or if no rent at all be reserved, &c. for then tithe shall be paid according to the rent, that then was last before reserved to be paid. The words of the decree are: Or that any lease shall be made without any rent reserved upon the same by reason of any fine or income, then the fermor shall pay for his tithes after the rate aforesaid, according to the quantity of such rent, as the house was lastly letten for, without fraud or covin, before the making of such lease. So as the decree consisteth upon foure points, viz. First, where the accustomed rent, &c. was reserved. Secondly, where the rent was increased, there the tithes should be paid according to the whole rent. Thirdly, where lesser rent was reserved. Fourthly, where no rent was reserved, but had been formerly reserved. And this act and decree were very beneficiall for the clergy of London, in respect of that which they had before: and the defendant in his libell confesseth, that the accustomed rent, &c. was reserved: and therefore no cause of suit.

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Secondly, it was resolved, that such houses as were never letten to farme, but inhabited by the owner, this is *casus omiffus*, and shall pay no tithes by force of the decree.

Thirdly, it was resolved, that where the decree saith, Where no rent is reserved by reason of any fine or in-come paid before-hand, albeit no fine or in-come be paid in that case, yet if no rent be reserved, the parson shall have his tithes according to the decree, for that is put but for an example or cause, why no rent is reserved, and whether any fine or in-come were paid, or no, is not materiall, as to the parson.

Fourthly, it was resolved, that the parson could not sue for the said tithes in the ecclesiasticall court, for that the act and decree that raised and gave these kind of tithes, did limit and appoint how, and before whom the same should bee sued for, viz. That if a controversie were moved in the city for not payment of those tithes, or concerning the true rent or tithes, that then upon complaint made by the party grieved to the lord maior of London, hee by advice of his assistants should make a finall end, with costs to be awarded by his discretion. And if the maior doth not make an end of it within two moneths, or if any of the parties find themselves grieved, that then the lord chancellor within three moneths shall make an end thereof with costs, according to the true intention of the said decree: therefore as the decree gave a new and speciall kind of tithings; so it did appoint new and speciall judges to heare and determine the same. And in the end it was awarded, that the prohibition should stand. Vid. for tithes in London, 27 H. 8. cap. 20. and 32 H. 8. cap. 7.

See lib. 5. fo.
73. the case of
Orphanage, in
London.

The 10. addition.

And be it further enacted, &c. that if any person do substract or withdraw any manner of tithes, obventions (23), profits, commodities,

commodities, or other duties before mentioned, or any part of them, contrary to the true meaning of this act, or of any other act heretofore made, that then the party so subtracting or withdrawing the same, may or shall be convented and sued in the kings ecclesiasticall court by the party from whom the same shall be subtracted or withdrawne, to the intent the kings judge ecclesiasticall shall and may then and there heare and determine the same, according to the kings ecclesiastical lawes. And that it shall not be lawfull unto the parson, vicar, proprietorie, owner, or other their fermors or deputies, contrary to this act to convent or sue such with-holder of tithes, obventions, or other duties aforesaid, before any other judge then ecclesiasticall. And if any archbishop, bishop, chancellor, or other judge ecclesiasticall give any sentence in the aforesaid causes of tithes, &c. and (no appeale ne prohibition hanging) and the party condemned do not obey the said sentence; that then it shall be lawfull for every such judge ecclesiasticall to excommunicate the said party so, as aforesaid, condemned and disobeying: In the which sentence of excommunication, if the said party excommunicate, wilfully stand and endure still excommunicate by the space of 40 daies next after, upon denunciation, and publication thereof in the parish church, or the place or parish, where the party so excommunicate is dwelling, or most abiding, the said judge ecclesiasticall may then at his pleasure signifie unto the king into his court of chancery of the state and condition of the said party so excommunicate, and thereupon to require processe *de excommunicato capiendo* (24), to be awarded against every such person as hath been so excommunicate.

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(23) *Obventions.*] Obventions aforesaid are offerings.

That the jurisdiction of tithes belong to the ecclesiasticall court, it appeareth by the acts of parliament, viz. of *Circumspecte agatis*, an. 13 E. 1. *Artic' Cleri* anno 9 E. 2. 18 E. 3. cap. 7. 1 R. 2. cap. 13. 27 H. 8. cap. 20. 32 H. 8. cap. 7. and this act.

Of ancient they were determined in the sherifes turne, as it appeareth in *lib. rubeo inter leges* H. 1. cap. 8. After by *scire fac'* at the common law before the statute of 18 E. 3. Vid. Rot. claus. 21 H. 3. m. 3. & Rot. Eschaet' 8 E. 1. nu 67. Regist. fol. 165. a writ of covenant to levie a fine *de decimis garbarum*, &c. 38 H. 6. 20. F. N. B. 30. e. f. 4 E. 3. 27. 29. 7 E. 3. fol. 5. per Parning. 8 E. 3. 49. Bracton, lib. 5. fol. 401. Britton, cap. 4. fol. 11. omitted tithes, &c. Fleta, lib. 6. cap. 36. 28 E. 3. 97.

Vid. Mich.
7 E. 1. coram
Reg. rot. 21.

At this day a writ of right of advowson lyeth *de advocacione decimarum ecclesie*, &c. for the tithe is the profit of the church; and if the tithes be taken away, the advowson is of none effect, and the esple in a writ of right of advowson (which is the fruit of the advowson) are alledged in the parson, in taking of the great and small tithes by the presentment of the patron. See 16 Ed. 3. tit. *Quare Imped.* 147. 30 E. 3. fol. 1. 38 E. 3. 13. 45 E. 3. 12. Brit. cap. 4. and the writ of *indicavit*, whercof you

4 E. 3. 27. per
Shard & per
Stoner, &c.
26 H. 8. 3.
F. N. B. 30. e.
F. N. B. 30. e.
Vet. N. B. 31.
4 E. 3. 27.
8 E. 3. 49.
31 H. 6. 16.
may
12 E. 4. 13.

13 H. 7. 16.
31 H. 8. pro-
hib. 17.

may read at large before in the exposition of the statute of W. 2. cap. 5.

This 10. addition for the establishment of ecclesiastical jurisdiction for tithes was made, but by the generality thereof (which observe well) it should have been doubted, whether the writ of right of advowson of tithes, and of *indicavit* had been taken away; but to clear the doubt, there is hereafter a special provision therefore, as hereafter shall be shewed. See the 12. addition.

(24) *Processe de excommunicato capiendo.*] See the statute of 5 Eliz. cap. 23. for divers notable things concerning this matter; but none of the penalties of that statute doe extend to the proceeding upon cause of tithes, but onely upon nine causes belonging to ecclesiastical jurisdiction particularly expressed in that act.

The 11. addition.

Be it further enacted, &c. that if any party at any time hereafter, for any matter or cause before rehearsed (25), limited, or appointed by this act to be sued or determined in the kings ecclesiastical court, or before the ecclesiastical judge, doe sue for any prohibition in any of the kings courts, where prohibitions before this time have been used to be granted: that then in every such case the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court where such party demanded prohibition, the very true copy of the libell depending in the ecclesiastical court concerning the matter, wherefore the partie demandeth prohibition, subscribed or marked with the hand of the same party; and under the copy of the said libell shall be written the suggestion, wherefore the party so demandeth the said prohibition. And in case the said suggestion by two honest and sufficient witnesses at the least, be not proved true in the court (26) where the said prohibition shall be so granted within 6 moneths next following after the said prohibition shall be so granted and awarded, that then the party that is letted or hindered of his or their suit in the ecclesiastical court by such prohibition, shall upon his or their request and suit, without delay, have a consultation granted in the same case in the court, where the said prohibition was granted, and shall also recover double costs and damages against the party that so pursued the said prohibition, the said costs and damages to be assigned or assessed by the court, where the said consultation shall be so granted; for which costs and damages the party to whom they shall be awarded may have an action of debt by bill, plaint, or information in any of the kings courts of record, wherein the defendant shall not wage his or their law, nor have any essoine or protection allowed or admitted.

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(25) *Rehearsed.*] This word is very materiall, for this additional act of 2 E. 6. extendeth onely to prediall and personall tithes; but in as much as this act doth rehearse the statutes of 27 H. 8. cap. 20. and 32 H. 8. cap. 7. both which statutes extend unto

unto all kind of tithes, viz prediall, personall, and mixt, and to offerings also; therefore this branch extendeth to them all. And it is to be observed, that this branch respecteth the cause of suit, viz. for tithes or offerings, and not the cause of the prohibition. Vid. Dyer, 2 Eliz. fol. 170.

(26) *And in case the said suggestion, &c. be not proved true in the court, &c.]* This clause was made in favour of the clergy for prooffe by witnesses, which they had not at the common law.

If the suggestion be in the negative, as if the proprietary of a parsonage impropriate sue for tithes, and the cause of the suggestion be, that the parsonage is not impropriate; or if the parson of Dale sue for tithes of lands in that parish, and the party sue a prohibition, for that the land lieth not in that parish, or that the parson that sueth for tithes was not inducted, &c. or any the like cause in the negative of any matter of fact, hee shall not produce any witness by force of this branch, because a negative cannot be proved: and therefore a prohibition upon causes in the negative remains at the common law.

If a man plead a deed in barre, wherein witnesses be, and issue is joyned, *non est factum*, and proceffe is awarded against the witnesses, who are joyned to the jury, and it is found *non est factum*, notwithstanding this joynder, the party grieved shall have an attain: for it is a maxime in law, That witnesses cannot testifie in the negative, but in the affirmative: otherwise it is, if they found it to be the deed of the party in the affirmative, there no attain doth lye. Vid. 11. aff. p. 19. 22 aff. p. 15. 23. aff. p. 11. 40 aff. p. 23. 12 H. 6. 6. F.N.B. 106. h. So it is, if the suggestion be grounded upon any matter in law, for that the suit for tithes in that kind are not due by law. As if the libell be in the ecclesiasticall court, for the tithe of tiles, turfes, or the like, there need no witnesses to be produced; for that matters in law are to be decided by the judges, and not to be proved by witnesses: and *quod constat curiæ, opere testium non indiget*, and the cause of this prohibition, or the like, appeareth in the libell it selfe. See before *Artic' Cleri 3. regis Jacobi, Artic' 18.*

Provided alwaies, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to give any minister or judge ecclesiasticall any jurisdiction to hold plea of any matter, cause, or thing, being contrary or repugnant to, or against the effect, intent, or meaning of the statute of West. 2. (27) the fifth chapter, the statutes of *Articuli Cleri* (28), *Circumspecte agatis* (29), *Sylva cædua* (30), the treatise *de regia prohibitione* (31), ne against the statute of *anno primo Edwardi tertii* the tenth chapter (32), or any of them, ne yet hold plea in any matter, whereof the kings court of right ought to have jurisdiction (33): any thing therein contained to the contrary in any wise notwithstanding.

A proviso touching the 11 addition.

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(27) *Statute of W. 2. cap. 5.]* Hereby, if need were, the writ of indicavit, and the writ of right of the fourth part of tithes, and all dependances thereupon are saved. See before in the exposition of this act of W. 2. cap. 5. anno 13 E. 1.

(28) *Articuli cleri.*] These articles were established by act of parliament anno 9 E. 2. See before in the exposition upon these articles. By this act also cap. 2. the writs of indicavit, and of right of advowson of tithes are saved.

10 H. 4. 1. b.

(29) *Circumspecte agatis.*] This act is (as here it appeareth) a statute, and enacted anno 13 E. 1. See before the exposition hereof.

(30) *Silva cædua.*] Here is intended the statute of 45 E. 3. cap. 3. concerning tithes *de silva cædua*, and not of great wood above 20 yeares growth.

Hill. 7 H. 4. pl. 2.

(31) *The treatise de regia prohibitione.*] Herein some difference is in our bookes; for in Hill. 7 H. 4. it is said, that the statute *de regia prohibitione* doth rehearse how *per venditiones spirituales sunt temporales* which clause is in *Artic' Cleri*, cap. 1. *in fine*. Also in

31 H. 6. 13, 14.

31 H. 6. it is said, that the statute *de regia prohibitione*, and recite the effect of the second chapter of *Artic. Cleri*. So as by these bookes the statute *de regia prohibitione* is the statute of *Artic' Cleri*: but it cannot be so conceived in this act, because herein they are distinguished as two severall statutes, and so in truth in the intendment of this act they are: and the treatise *de regia prohibitione* intended by this act is that treatise *de regia prohibitione*, intituled *Prohibitio formata super artic'*. Vide Vet. Mag. Chart. part 2. fol. 7. Rastall abridg. stat. tit. prohib. pl. 6.

21 E. 3. 29. 3.
Concerning lay
fee, &c. this is
affirmed to be a
statute.

(32) *Statute of 1 E. 3. cap. 10.*] This is misprinted; for the act is 1 E. 3. stat. 2. cap. 11. that if any suit be in the spirituall court against inditers, a prohibition doth lye. This act is in affirmance of the common law. Vide Regist. fol. 39. lib. intr. R. 447. b. tit. Defamation.

(33) *Ne yet bold plea in any matter where the kings court of right ought to have jurisdiction.*] So provident the makers of this statute were to keep both jurisdictions within their proper bounds, a great meanes to make both church and common-wealth flourish. And this is a large and a generall saving of the jurisdiction of the kings courts of the common law.

The 13. and last
addition.

Provided neverthelesse, where heretofore such a custome hath been in many parts of Wales, that of such cattell and other goods as have been given with marriage of any person, there tithes have been exacted and levied by the parsons and curats in those parts; which custome being dissonant from any part of this realme, as it seemeth, when the country of Wales was through civill dissention uncultured for want of other sufficient profits, that might otherwise grow to the curats and ministers there, to have been for that time tolerable (34), so now the countrie being now well manured and husbanded, and the tithe is duly paid there of corne, hay, wooll, and cheefe, and of other increase of all manner of cattell, as it is commonly in all other parts of this realme, the same custome seemes to be grievous and unreasonable, specially where the benefices are else sufficient for the finding of the said ministers and curats: that it be therefore enacted by the authority aforesaid, that from and after the first day of May next coming no such tithes of marriage goods be exacted or required of any person within the said dominion of Wales, or marches of the same:

any

any thing in this act contained, or any other act, custome, prescription had or made to the contrary hereof notwithstanding.

(34) *To have been for that time tolerable.*] Here is first to be noted, that a custome once reasonable and tolerable, if after it become grievous, and not answerable to the reason, whereupon it was grounded, yet is to be (as here it appeareth) taken away by act of parliament; for an inheritance once fixed cannot be taken away, but by parliament. Secondly, here is to be noted, that by custome a parson, &c. may have tithes of such things, as are not tithable of common right.

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An Exposition upon the Statute of 1 H. 5. Cap. 5. of Additions.

ORDEINES est et establies, que en chescun brieve original (1) des actions personels, appeales, et indictments, et en queux exigends serr^r agard^r (2), que aux nosmes des defendants en tiels briefes originals, appeales, et indictments soient faits addition de leur estate, ou degree (3), ou de mestier (4), et les villes (5) ou hamlets (6), lieux (7), et les counties (8) de queux ils fueront ou sont, ou en queux ils sont ou fueront conversantes. Et si per proces sur les dits briefes originals, appeales, ou indictments, en queux les dits additions soient enterlesses aucuns utlagaries soient pronuncies, que ils soient voides (9), irrites, et tenus pur nul. Et que avant les utlagaries pronuncies les dits briefes et indictments soient abatus per exception du partie (10), per la ou en icell^s les dits additions soient enterlesses. Purview tous foits, que mesq^s les dits briefes dactions personels ne soient accordants as recordes, et faits (11) per le surplusage de additions suisdits, que pur cel cause ils ne soient abatus. Et que les clerkes del chancellerie (12), south que nosmes tiel^s briefes issent escriptes

ne

ITEM it is ordained and establisshed, that in every original writ of actions personals, appeals, and indictments, and in which the exigent shall be awarded, in the names of the defendants in such writs original, appeals and indictments, additions shall be made of their estate or degree, or mystery, and of the towns, or hamlets, or places, and counties, of the which they were, or be, or in which they be or were conversant; and if by process upon the said original writs, appeals, or indictments, in the which the said additions be omitted, any utlagaries be pronounced, that they be void, frustrate, and holden for none; and that before the utlagaries pronounced, the said writs and indictments shall be abated by the exception of the party, where in the same the said additions be omitted. Provided always, that though the said writs of additions personals be not according to the records and deeds, by the surplusage of the additions aforesaid, that for that cause they be not abated; and that the clerks of the chancery, under whose

3 U 4

names

ne enterlessent, ne facent omission des dits additions, come desuis est dit, sur peine destre punis, et faire fine al roy per discretion de le chancellor (13). Et commencera cest ordinance a tener lieu al suit de partie, de la feast de Saint Michael prochain ensuant (14).

names such writs shall go forth written, shall not leave out, or make omission of the said additions as is afore said, upon pain to be punished, and to make a fine to the king, by the discretion of the chancellor. And this ordinance shall begin to hold place at the suit of the party, from the feast of St. Michael next ensuing forward.

(4 Ed. 4. f. 10. 6 Rep. 67. Cro. El. 198. Cro. Jac. 610. Dyer, 46. Bro. Addit. 4, 5, 7, 8, 9, 10, 12, 14, 15, 19. Fitz. Brief, 30, 36, 40, 47, 49, 51, 61, 67, 72, 75, 109, 122, 124, 125, 129, 151, 163, 169, 201, 236, 940. 2 Leon. 183, 200. 3 H. 6. 30. b. pl. 17. 2 Roll, 225. 3 Mod. 139. 1 Shower, 16. Hob. 129. Mo2. Cases in Law, 52. 8 H. 6. c. 12. 5 El. c. 23.)

We shall, in expounding the words of this act, shew what was the common law before the making hereof.

3 H. 6. 30.
14 H. 6. 21.
35 H. 6. 30.
10 E. 4. 16. a.
18 E. 4. 9.
* 10 E. 4. 16.
10 H. 7. 21.
13 H. 7. 21.

(1) *En brieve originall.*] Though it be in writ originall, yet if the plea be not holden upon the originall, this act extendeth not to it; as in a *recordare* to remove a plaint of replevin into the common place, because the plea is holden upon the plaint, this act extends not to it. * So in a returne of rescous, though there lyeth processe of outlawry, yet this statute extends not to it, because this act speaketh only of writs originall.

9 aff. pl. 1.
9 E. 3. aff. 449.
7 H. 4. 39.

(2) *Des personels actions, &c. en queux exigends ferr' agard'.]* In an assise of *novel disseisin*, if the disseisin be found with force and armes, a *capias pro fine* and exigent doe lye for the king; yet the defendant shall have no addition within this statute, for that the originall writ is in the realty, and this act extendeth onely to personall actions.

* 17 E. 3. 44. b.
11 H. 6. 11. in
maintenance.
27 H. 6. 3.
10 E. 4. 16.
10 E. 4. 12.
35 H. 6. 12.

Aux nosmes des defendants.] * Regularly by the common law every naturall man, having no name of dignity, ought to be named in all originalls, and other suits by his christian name and surname, and that before this act * suffised; but if he had a name of inferiour dignity (as knight, or banneret) he ought to be named by his christian name and surname, and by the addition of his name of dignity by the common law, which is implied in these words: *aux nosmes des defendants.*

* [666]
27 H. 6. 9.
10 H. 6. 1.
7 E. 4. bre. 163.
18 E. 4. 21.
8 E. 3. 247.
24 E. 3. 31.
19 E. 3. 17.
35 H. 6. 12.
32 E. 3. bre. 291.
32 H. 6. 28, 29.
* 12 E. 4. 10.
18 E. 4. 9.
21 E. 4. 158.

If there be a corporation of one sole person that hath a fee-simple, and may have a writ of right, he may be named in originalls, &c. by the common law by his christian name, without any surname; for the name of his corporation is in lieu of his surname (some say both christian name and surname) as John abbot of D. &c. John bishop of N. but otherwise it is of a parson: for hee must be named by his christian name and surname.

* If it be a corporation aggregate of many able persons; as maior and comminallty, dean and chapter, master of an hospital and confreres, &c. the maior, deane, or master need not be named by his christian name, because that such a corporation standeth in lieu both of the christian name and surname.

2 H. 6. 29.
7 E. 3. 26.
25 E. 3. 39, 40.
7 E. 4. brev. 103.

If a man be created by letters patents duke, marquess, earle, viscount, or baron, the dignity is so incorporated to him, according to the state given unto him by those letters patents, as the duke, &c. by

by the common law might be named by his christian name, and by the name of his dignity, which standeth in lieu of his surname: as *Præcipe Johanni duci Lancastriæ*. And the reason thereof is, for that the king by those letters patents creates him to the state, honour, and degree of duke, *et imponit ei stilum et titulum ducis Lanc' &c. habend' &c. et sic in similibus*. And albeit a creation by writ hath not the same words, yet it hath the same effect.

And it is to be observed, that *superosme* is derived of *sur* (*id est*) *super*, and *nosme* (that is) *nomen*, *quasi super nomen*, because it is super-added to the christian name, which legally is *prænomen*, in Latine *cognomen*, *quia conjunctum nomen*.

(3) *Soient faits addition de leur estate, ou degree, ou de mestier.* Estate, *status à stando*, the condition wherein any subject standeth. Degree, *gradus à gradiendo*, the degree wherein any subject standeth. So as in legall understanding these two words are of * one signification, and doe extend to persons of nobility, of dignity, and under the degree of nobility and dignity; as yeoman, &c. and doe extend as well to the clergy as to the temporality, and to graduates and degrees in universities in any kind of profession.

State of a lord, 3 E. 4. cap. 5. *sepe*.

Under the estate of a knight, & cap. 14. of the estate of carriers, plowmen, &c. and the estate of a groom attending to husbandry, cap. 13. degree and estate of clerkes.

Degrees applied to all, as well women as men.

No yeoman, nor lower estate then an esquire.

Under the degree of a knight or lords son.

Under the degree of a barons son, or knight.

So as in legall understanding, *status* and *gradus sunt synonyma*. And so in the ancient writ of the call of a serjeant, * *ad statum et gradum servientis ad legem*.

The estates and degrees against whom originall writs may be brought, are the queen, consort of the king, the prince of Wales, dukes, * marquesses, earles, viscounts, and barons. These are of the greater nobility.

Knights of Saint George, knights bannerets, knights of the bathe, knights of the chamber, * *milites cameræ*, knights batchelors, baronets, esquires, gentlemen. These are of the lesser nobility.

Cives, burghenses, and yeomen, which are of the lowest estates or degrees.

There is another division made in our * books of lesser nobility, *viz.* some be names of dignities, as all the knights abovesaid, and baronets; and some of worship, as esquires and gentlemen.

Baronets were first raised and created by king James, of an estate to them and the heires males of their bodies: and where in some * statutes and records baronets are named, it is *vitium impressoris, seu scriptoris*, and should be bannerets, who were not of inheritance, for that they were knights, which dignity was not descendable, nor yet is. Bannerets rightly named. Rot. Parl. 46 E. 3. nu. 10. 50 E. 3. nu. 40. 1 H. 4. nu. 53, &c. In letters patents, Rot. Pat. anno 13 E. 3. m. 13. Will. de la Pool *statum et honorem baneretti*, part 2. 15 E. 3. m. 22, 23. & Rot. Pat. anno 7 R. 2. 8. octab' Thomas Camois banerettus, &c. 22 E. 3. fol. 18. a banner, *quia nomen habet à vexillo*, of the banner, &c. Corruptly banneret,

5 E. 3. 28. 99.
22 ass. 24.
Nota, nobility
in a manner in-
corporated.

* 37 E. 3. ca. 8.
22 E. 4. cap. 1.
8 E. 4. cap. 2.
13 R. 2. stat. 2.
cap. 1.

22 E. 4. cap. 1.
37 E. 3. ca. 10.

3 E. 4. cap. 5.
16 R. 2. cap. 4.
20 R. 2. cap. 2.
24 H. 8. cap. 13.
8 Eliz. cap. 11.

* Fortesc. ca. 50.
14 H. 6. 15. Br.
tit. Addition 44.

* Marchiones.
26 H. 6. bre.
100.

b Rot. pat.
29 E. 3. part. 1.
m. 29.
Armigeri, scuti-
feri, unde scuta-
gium, generosi.
* 14 H. 6. 14.
Camb. Brit.
p. 24.

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* Rot. Parl.
2 R. 2. nu. 13,
14. 13 R. 2.
stat. 2. cap. 1.
14 R. 2. cap. 11.
16 R. 2. cap. 6.

Vid. Camb. ubi
sup.

ronet, in 35 H. 6. 46. for baron. But let us proceed to some more profitable matter.

Lib. rubr. 8.
Bract. lib. 1.
cap. 8.

There have been within this realme since the conquest divers names of dignities, which are growne to dis-use, and in a manner lost: as, *vicedomini*, *vidams*. *Vavafores*, *viri* (as Bracton saith) *magnæ dignitatis*. *Vavafor enim nihil melius dici poterit, quam vas fortitum ad valetudinem: unde vavaforia* in divers ancient records. Camden Brit. 123. *vavafores seu val-vafores proxime post barones locum olim tenuerunt*. See Chaucer our English poet in the Franklyn's prologue.

Some doe hold, that it had been more fit to have revived some of the ancient dignities, then to have created any of a new invention.

We have spoken of all the names of dignity, let us now speake of the names of worship.

[*Esquier, armiger, scutifer, &c.*] In legall understanding he is derived *ab armis, quæ in clypeis gentilitiis honoris insignia gestant*. In Spanish *escudero, ab escudo, id est, scuto*.

37 E. 3. cap. 10.
1 R. 2. ca. 7.
16 R. 2. ca. 4.
20 R. 2. ca. 2.
7 H. 4. 7.
28 H. 6. 8.
32 H. 6. 28, 29.
3 E. 4. cap. 5.
Rot. Parl. anno
1 E. 4.

In this sense, as a name of estate and degree, it was used in divers acts of parliament before the making of this act, and * after this act also. Et Rot. Parl. an. 1 E. 4. John lord Audeley, an ancient and a noble baron, was named *Johannes Audeley armiger*, for that all the rest of the barons that appeared at that parliament were knights: and all dukes, marquesses, earles, viscounts, and barons of other nations, or which are not lords of the parliaments of England, are named *armigeri*, if they be no knights; and if knights, then are they named *milites*.

The sonnes of all the peeres and lords of parliament in the life of their fathers, are in law esquires, and so to be named. By this statute the eldest son of a knight is an esquire.

See before stat.
de Militibus,
anno 1 E. 2.

[*Gentleman, generosus, Gentill home.*] This is also a good addition. And every gentleman must be *arma gerens*, and the best tryall of a gentleman in bloud (which is the lowest degree of nobility) is by bearing of armes. For as in ancient time the statues or images of their ancestors were proofes of their nobility, which was a solemne and honourable, but yet a cumbersome tryall, whereof, and how in time they decayed, the poet speaketh,

Juv. en. 8.
sat. 8.

*Stemmata quid faciunt? quid prodest pontice longo
Sanguine censer, pictosque ostendere vultus
Majorum, et stantes in curribus Æmylianos,
Et curios jam dimidios, nasumque minorem
Corvini, et Galbam auriculis nasoque carentem? &c.
Tota licet veteres exornent undique ceræ
Atria: nobilitas sola est atque unica virtus.*

Cicero.
Cicero.

*Flavia gens obscura quidem, et sine imaginibus.
Nobiles sunt qui imagines generis sui proferre possunt.*

So of later times coat-armes came in lieu of those statues or images, and are the most certaine proofes and evidence of nobility and gentry. So as in these daies the rule is, *nobiles sunt qui insignia gentilitia generis sui proferre possunt*.

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There is small difference between an esquire and a gentleman; for every esquire is a gentleman, and every gentleman is *arma gerens*.

And

And *generosus* and *generosa* are good additions: and if a gentlewoman be named spinster in any originall writ, &c. appeale, or inditement, she may abate and quash the same; for she hath as good right to that addition, as baronesse, viscountesse, marchionesse or dutchesse have to theirs.

* A man may have an addition of gentleman within this statute, if hee be a gentleman by office (though he be not by birth) as many of the kings household, and of other lords, be; and * clerkes, being officers in the kings courts of record: and if they be out of their office, they are but yeomen; and yet as long as they continue in their office, they ought to be named gentlemen, as their due addition.

A gentleman by ^b reputation, that is, neither gentle by birth, nor by office, nor by creation. but commonly called gentleman, and knowne by that name, is a sufficient addition within this act. And so was it adjudged in ^c Caters case, Hill. 25 Eliz. in *communi banco*, but if he be named yeoman, hee cannot abate the writ.

A French knight challenged ^d John Kington yeoman, the kings subject, at certaine points and deeds of armes, &c. *unde rex* (saith the record) *ut dictus Johannes honorabilis in præmissis accipiat, ipsum Johannem in ordinem * generosorum adoptavit, et armigerum constituit, et cætera honoris insignia concessit.* And such a gentleman or esquire so created, is an addition within this statute.

* Since the making of this statute, esquire and gentleman were more frequently by force of this act used, as additions in originalls, &c. and afterwards were commonly used in deeds and other specialties. * He that hath taken any degree in either university, may be named by that degree without question, being within the direct letter and meaning of this act; and if he hath taken any degree in divinity, he may have the addition of clerke.

^f *Yeoman or yeman.*] This is a Saxon word *geuen gemen*, the G being turned in common speech (as is usuall in like cases) into a Y. In ^g legall understanding a yeoman is a free-holder, that may dispend 40 shillings, anciently 5 nobles *per annum*: and he is called *probus et legalis homo*.

And as of ancient time the ^h gentleman held *per servitium scuti*, by knights service, so the yeoman held *per servitium socæ*, by so-cage. Of this degree see Fortescue, cap. 25. & 29.

ⁱ This degree is a good addition within this statute, and is applied onely to the man, and not to the woman.

We have omitted * citizens and burgeses (albeit they are such as are called to parliament) yet because they are no sufficient additions (being too generall) within this act, we have omitted them.

(4) * *Mistier.*] *i. ars, seu artificium, Latine dicitur, mysterium, Anglicè mysterie. Mistier derivatur à maître, Latine magisterium,* because no man ought to exercise it, but he that is a maister of it. *Mistier* is a large word, and includeth all lawfull arts, trades, and occupations, as taylor, merchant, mercer, husbandman, labourer, and the like. But ^l servant, groome, or fermor are no additions within this act, because they are not of any mysterie. And ^m chamberer, butler, pantler, or the like, are additions of offices, and not of any mysterie or occupation.

Neither doth this act extend to unlawfull practises, as extortioner, maintainer, abetter, hereticke, &c.

Trade

- 21 E. 4. 15.
Lib. int. Rat.
108. 10 E. 4. 16,
23 H. 6. 3, 4.
7 E. 6. Dyer, fo.
88. lib. int. fol.
107. nu. 9. de
gradu hominis
generosi, et non
de gradu homi-
nis vocat' a yeo-
man.
* 28 H. 6. fo. 4. a.
5 E. 4. 33. acc.
14 H. 6. 15.
* 20 H. 6. 30. b.
^b Reputatio est
vulgaris opinio,
ubi non est ve-
ritas.
^c Lib. 6. fol. 67.
Hill. 25 Eliz. in
communi banco,
Caters case.
Lib. int. R. fol.
107. nu. 8.
Vid. lib. int. fol.
107. nu. 7. a
fellow of Cle-
ments Inne, &c.
^d Rot. par.
13 R. 2. part 1.
* Nota, the
creation of a
gentleman.
^e 21 H. 6. bre. 29.
28 H. 6. 8.
7 H. 4. 7.
16 H. 6. 28.
* 35 H. 6. 55. b.
^f Lib. 6. fol. 67.
^g See the first
part of the Insti-
tutes, sect. 464.
2 H. 5. cap. 3.
See the first part
of the Institutes,
sect. 95.
^h Fortesc. ca. 25.
& cap. 29.
ⁱ 10 E. 4. 16.
1 H. 4. cap. 7.
2 H. 4. cap. 21.
* 27 H. 6. 4.
4 E. 4. 10.
5 E. 4. 142.
1 H. 5. 3.
35 H. 6. 12.
^k 22 E. 4. 1.
2 R. 3. 2.
9 H. 6. 65.
35 H. 6. 55.
4 H. 6. 26.
5 E. 4. 33.
3 H. 6. 31.
11 H. 6. 11.
17 E. 4. 10.
9 E. 4. 50.
23 H. 6. 4.
* 5 E. 4. 32.

Trade dicitur à tradendo, quia tradit nobis necessaria: the Saxon word is Cræft, Cræft, bodie craft, id est, trade.

34 H. 6. 15.

5 E. 4. 33.

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If a man have divers arts, trades, or occupations, he may be named by any of them: but if a gentleman by birth be a mercer (as many younger sonnes of gentlemen be bound prentices to arts and trades in London, and elsewhere) if he in an originall, &c. be named mercer, or of any other trade, whereof hee is in truth, he may abate the writ, &c. for he ought to be named by the degree of a gentleman, because it is worthier then the addition of any myserie.

27 H. 6. 4.

4 E. 4. 10.

5 E. 4. 142.

35 H. 6. 12.

And so it is, if one man be a duke, a marquesse, earle, viscount, and baron, all these dignities stand distinctly in him, and the greater drowneth not the lesser, yet shall hee be named in originall writs, &c. by the worthier dignity, viz. by the name of a duke onely within this act.

Having diligently observed the order of this act, we find, that in some cases the order thereof is observed, and in others not. In appeales and inditements of treason or felony, &c. against the greater nobility, as dukes, marquesses, the order of the statute is pursued, viz. For, 1. the estate and degree (for example) of a duke, &c. is named, and after the towne and county. *Edwardus dux Buckingham nuper de N. in com' Glouc'*. And so it is when one is named of a citie, which is a countie of it selfe, the like order is observed: as *J. S. pannarius de London in com' civitatis London*.

But in case of the lesser nobility, and all other under them, the towne and county are named before the addition: as, *Th. C. nuper de D. in com' M. miles. Jo. C. nuper de D. in com' M. armiger. N. C. nuper de D. in com' M. merchant, &c.*

7 H. 6. 39.

22 H. 6. 29.

21 E. 4. 51.

(5) *Et les villes, ou hamlets, ou lieux, et les counties.*] *Villes*. For these see the first part of the Institutes, sect. 171. And if there be *D. major*, and *D. minor*, and not *D. tantum*, he cannot be named of *D.* for there is no such towne.

(6) *Hamlets.*] See the first part of the Institutes, *ubi sup.* And it is at the election of the party to name him of the hamlet or towne.

(7) *Lieux.*] These be understood of places knowne out of any towne or hamlet. 14 H. 6. 24. 35 H. 6. 30. 21 E. 4. 89. 4 E. 3. 129. 19 E. 3. bre. 467. 7 H. 6. 24. 37. 20 H. 6. 30. 7 H. 4. 27. 17 E. 3. 56. 43 E. 3. 5.

Bract. lib. 3. fol.

124. b.

19 H. 6. 1.

By the ancient common law of England, *secundum antiquam consuetudinem dici poterit de familia alicujus, qui hospitatus fuerit cum alio per tres noctes, et vocatur Hogbenedhne.*

(8) *Counties.*] See the first part of the Institutes, sect. 61. & 248.

See the first part
of the Institutes,
sect. 171.

7 H. 6. 1.

27 H. 6. 4.

4 E. 4. 10.

5 E. 4. 142.

21 E. 4. 15.

* 22 H. 6. 47.

35 H. 6. 30.

4 E. 4. 41.

5 E. 4. 20.

22 E. 4. 2.

1 E. 3. 8. lib. 4. c. 14. Arundall.

But seeing that ancient boroughes were first townes, and cities were formerly boroughes, if a citie be a countie of it selfe, wherein are divers parishes, yet the addition *de London*, or *nuper de London*, is sufficient within this statute.

* The addition of a parish, if there be two or more townes within it, is not good, but if there be one towne, the addition of parish is good within this statute: and it shall not be intended (if it be not pleaded) that there be more towns then one in the parish; for *non præsumitur pluralitas*.

This statute extends not to some cases, though the defendant be

not named of any towne, hamlet, or place. ° As in an action of debt, the writ is, *præcipe R. G. rectori ecclesiæ de T.* without alledging in what town, hamlet, or place he is dwelling. So if the *præcipe* in an action of debt be, *Prec' Tho' Chafe cancellario universitatis Oxon'*, without saying *de Oxonia*. So in a writ brought against the husband and his wife, or the abbot and his commoigne, the plaintife need not shew in what towne, &c. the wife or commoigne dwell; for the law shall intend (which ever intendeth the best) that the parson is resident upon his rectory, the chancellor upon his office, the wife with her husband, and the monke with his foveraigne.

° The addition as well of the estate, degree, or mysteric, as the towne, hamlet, or place, ought by force of this act to be alledged *in primo nomine*; for the proper use of an *alias dict'* is, to agree with the record, or specialty whereupon the writ is grounded, and is not traverfable.

The addition of the estate, degree, or mystery ought to be by force of this act, as the defendant was of at the day of the writ purchased, and not with a *nuper*, as *nuper armiger*, *nuper monachus*, *aut nuper comes de D. &c.* but a *nuper* may be of the towne, &c. because men doe often remove their habitation. And this distinction appeareth by the act it selfe, by reason of these words in the act, relating to the townes, hamlets, &c. *Ou ils fuer', ou sont.*

The end of the purview of this act was, that the person of the defendant in originalls, &c. where proceffe of outlawry did lye, should be so described by certaine additions, as one man might not be troubled for another. See other statutes made to the same end. 8 H. 6. cap. 10. * 6 H. 8. cap. 4. 5 E. 6. cap. 26. 31 El. cap. 3. & 9.

(9) *Assus utlagaries sont prononce, que ils soient voides, &c.* This being a judgement in law is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *cap. utlegat'*, according to the course of the common law: for though the words of the statute be *voides*, yet it is but voidable by a writ of error, or plea; which is worthy of observation. 19 H. 6. fol. 1. 8 H. 6. cap. 10. pl. com. 137. b. 7 H. 6. 27. 39. 10 H. 6. 8. 11 H. 6. 19. 67. 19 H. 6. 58, &c. 20 H. 6. 20. 21 H. 6. 23. 55. 37 H. 6. 1. 38 H. 6. 1. 22 H. 6. 18. & 23. 36. 30 H. 6. 1. 21 E. 4. 94. 73. 1 E. 4. 2. 2 E. 4. 10. 4 E. 4. 10. 41, 42. 22 E. 4. 37. 10 E. 4. 13. 5 H. 7. 16. 11 H. 7. 5. 21 H. 7. 13. 3 El. 192. b. 4 El. Dyer, 213, 214.

(10) *Per exception du partie.* But if the defendant, albeit hee hath not such addition as this act requireth, yet if he appeareth upon proceffe, and plead, taking no advantage thereof by exception, he hath lost the benefit of this act.

(11) *Ne soient accordant al records et faits, &c.* *Abundans causela non nocet*; but if the addition prescribed by this act had varied from the record or deed, yet being injoynd by act of parliament to be contained in the writ, &c. such variance should not have abated the writ, albeit this clause had been omitted; but yet an act of parliament cannot be made too plaine.

(12) *Et que les clerkes del chancerie.* *i. e. les courseteurs.* *Clerici de cursu*, that make out originall writs. Of these there be in the chancery twenty in number. To every of these are appointed certaine counties, and are a corporation of themselves.

* 7 H. 6. 1.
10 H. 6. 8.
8 H. 6. 33.
3 H. 6. 31.

P Alias dict'
30 H. 6. 5. & 6.
32 H. 6. 33.
36 H. 6. 28.
4 E. 4. 10.
21 E. 4. 15. 18.
33 H. 8. Dyer,
50. b. 1 E. 4. 1.
5 E. 4. 141.
26 H. 6. bre.
100. 28 H. 6. 9.

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9 E. 4. 2.
21 H. 6. 3. b.
2 H. 6. 4.
32 H. 6. 20. 29.
5 E. 3. 28.

* Dyer, 4 Eliz,
213, 214.

7 H. 6. 37.
35 H. 6. 12.
5 E. 4.
Vid. Br. tit. error 69.
3 H. 6. 24. 35.
28 H. 6. 9.
21 E. 4. 95.

Fleta, lib. 2. ca.
12. 14 & 15 H. 8.
cap. 3.

(13) *Destre punies, et faire fine per le discretion del chancellor.*] This extendeth to the lord keeper of the great seale, as often elsewhere hath been observed.

(14) *Et commencera cest ordinance a tener lieu al suit de partie de la feast de S. Michael prochain ensuant.*] This parliament began 15 Pasch' 1 H. 5. And this statute was made, when acts of parliament were not printed, but were by the sherifes proclaimed in every county (as elsewhere hath been shewed:) and therefore to the end the subject might take notice thereof, day was given by this act untill the feast of Saint Michael the archangel following; but at the kings suit this act began presently, for that the kings learned councill were attendants in parliament, and had sufficient notice of this act.

[671] An Exposition upon the Statute of 27 H. 8. ca. 16. intituled, An Act concerning Inrolments of Bargaines, and Contracts of Lands and Tenements.

BE it enacted by the authority of this present parliament, that from the last day of July, which shall be in the yeare of our Lord God 1536. no mannors, lands, tenements, or other hereditaments shall passe, alter, or change from one to another, whereby any state of inheritance or freehold shall be made (1), or take effect in any person or persons, or any use thereof to be made, by reason onely of any bargain (2) and sale thereof (3); except the same bargain and sale be made by writing (4) indented (5), sealed and inrolled (6) in one of the kings courts of record at Westminster (7), or else within the same countie or counties where the same manors, lands, or tenements. so bargained and sold, lye or be, before the *custos rotulorum* (9), and two justices of the peace (8), and the clerke of the peace of the same countie or counties, or two of them at the least, whereof the clerke of the peace to be one: and the same inrolment to be had and made within six moneths next after the date of the same writings indented (10), the same *custos rotulorum*, or justices of the peace, and clerke, taking for the inrolment of every such writing indented before them, where the land comprised in the same writing exceed not the yearly value of 40 shillings, 2s. (11) that is to say, 12d. to the justices, and 12d. to the clerke, and for the inrolment of every such writing indented before them, wherein the land comprised exceed the summe of 40 shillings yearly value, 5s. that is to say, 2s. 6d. to the said justices, and 2s. 6d. to the said clerke for the inrolling of the same. And that the clerke of the peace for

for the time being, within every such county, shall sufficiently inroll and ingrosse in parchment (12) the same deeds or writings indented, as is aforesaid, and the rolls thereof, at the end of every year shall deliver unto the *custos rotulorum* (13) of the same county for the time being, there to remaine in the custody of the said *custos rotulorum* for the time being, amongst other records of every of the same counties, where any such inrolments shall be so made, to the intent that every party that hath to doe therewith may resort and see the effect and tenour of every such writing so inrolled.

(1) *Of inheritance, or freehold shall be made, &c.*] After the statute of 27 H. 8. cap. 10. of transferring uses into possession. If a man by his deed had bargained, and sold for valuable consideration, any lands, &c. of any estate of inheritance, free-hold, or for yeares, the same had been executed by the said act of 27 H. 8. cap. 10. Now this act of inrolments restraines onely estates of inheritance and free-hold; and therefore bargaines and sales for yeares, for what number soever, are not restrained by this act, though it be not by deed indented nor inrolled.

(2) *By reason only of any bargain, &c.*] If a man for valuable consideration by deed indented doe bargain and sell lands to another and his heires, and before the deed be inrolled he levieth a fine, or maketh a feoffment to the bargaine and his heires of the same lands, and after, and within the six moneths the deed is inrolled, the bargaine shall be in by the fine or feoffment, and not by the bargain and sale, both by reason of this word only, &c. and that the estate by the common law vested shall be preferred.

(3) *Of any bargain and sale thereof.*] First, what is a bargain and sale? &c. A bargain and sale is a reall contract * upon valuable consideration for passing of mannors, lands, tenements, or hereditaments by deed indented and inrolled within six moneths after the date of it, without livery of seisin, or attornment of tenants.

If the bargainor be in possession, this is a facile and ready assurance, but the feoffment reduceth and restoreth the possession to the feoffor, and passeth the land to the feoffee, though the feoffor had been disseised, &c. and the inrolment is not pleadable as the feoffment is.

Secondly, whether these words of [bargain and sale] only, or equipollent words may be used; &c. to take effect by force of this statute? Though it be good to use those words mentioned in this act, yet are they not of necessity to be used; for whatsoever word upon valuable consideration would have raised an use of any lands, tenements, or hereditaments at the common law, the same doe amount to a bargain and sale within this statute: as if a man by deed indented and inrolled according to this act doth covenant for valuable consideration to stand seised of lands to the use of another, &c. this is in nature of a bargain and sale within this act.

A. seised of certain lands in fee, demised the same to C. for life, the remainder for life reserving a rent at the feast of Saint Michael, and of the annuntiation; A. by indenture, in consideration of 50 pounds, doth demise, grant, let, and to farme let the same lands to B. for 99 yeares, reserving a rent at the same feasts presently, and C. for life did not attorne; and it was adjudged, that the

Lib. 2. fol. 36.
Sir Rowl. Heywards case.
Lib. 8. 94.
Foxes case.

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Trin. 33 Eliz. in
communi banco,
int' Ric. Libbear.
plaintife en
waste, & Eliz.
Hynd defendant,
lib. 5. fol. 71.
Hynds case.
* Pl. com. 307. a.
30 H. 8. tit. at-
tornement,
Br. 29.

19 H. 6. 6.

Lib. 8. fol. 93,
94. Foxes case.

Lib. 7. fol. 40.
Bodley case.
Lib. 8. fol. 93,
94. Foxes case.
Lib. int. Co.
116. a. b.

Lib. 8. fol. 93,
94. Foxes case.
Vid. l. 2. fo. 35.
Sir Rowland
Heywards case.

said demise and grant upon the consideration of 50 pounds amounted to a bargain and sale for the said terme. So if a man for valuable consideration doth by deed indented and inrolled alien or grant the land to a man and his heires, &c. this is a bargain within this statute, *et sic de similibus*. But inasmuch as the intention of the parties is the principall foundation of the creation of uses, if by any clause in the deed it appeareth, that the intention of the parties was to passe it in possession by the common law, there no use shall be raised: and therefore if any letter of attorney be in the deed, or a covenant to make livery, or the like, there nothing shall passe by way of use, but according to the intention of the parties possession by the common law. And albeit no valuable consideration be expressed in the indenture, yet if any were given, the same may be averred, and the land doth sufficiently passe.

4 Mar. Dyer, fol.
146. Villiers
case.

Lib. 11. fol. 25.

a. Harpers case.

Lib. 1. fol. 176.

Mildmayes case.

A. by deed indented and inrolled in consideration of 100 pounds paid by B. bargaineth and selleth the land to B. C. and D. parties to the indentures: in this case the land passeth to them all; for although the valuable consideration be expressed to be paid by one, yet it must be intended, that it was paid for them all, to the end, that the land may passe to them all, according to the meaning of all the parties, and a consideration given by one of the parties, is sufficient to convey the land to them all.

(4) *Except the same bargain and sale be made by writing.*] First, it must be by writing, and not by print or stamp.

* Lib. 5. fol. 20.

b. Stiles case.

See Stiles case,
ubi supra.

Secondly, it must be * written in parchment or paper, and not upon wood, stone, lead, or other materiall.

(5) *Indented.*] If the deed begin, *Hæc indentura*, or, This indenture, yet if the deed be not indented, it is no indenture; but if the deed be indented, though the deed doth begin, This deed made, without mentioning the word of indenture, yet is it a writing indented within this statute.

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Trin' 29 Eliz.
in the kings
bench.

In an action of debt between Scudamore and others plaintifes, and Vandenstene defendant, upon an indenture of charter party the case was this: the indenture of charter party was made between Scudamore and others owners of the good ship, called B. whereof Robert Pitman was master, on the one partie, and Vandenstene on the other party. In which indenture the plaintife did covenant with the said Vandenstene and Robert Pitman, and also Vandenstene covenanted with the plaintife and Robert Pitman, and bound themselves to the plaintife and Robert Pitman for performance of covenants in 600 pounds. And the conclusion of the said indenture was, "In witnesse whereof the parties abovesaid to these present " indentures have put to their seals." And the said Robert Pitman to the said indenture put his hand and seal, and delivered the same. The defendant in barre of the said action pleaded the release of Pitman, &c. whereupon the plaintife demurred. And it was adjudged, that the release of Pitman did not barre the plaintife, because hee was no party to the indenture. And the diversity was taken and agreed betweene an indenture reciprocally betweene parties on the one side, and parties on the other side, as this was; for there no bond, covenant, or grant can be made to or with any that is not party to the deed. But where the deed indented is not reciprocally, but is without a between, &c. as, *omnibus Christi fidelibus*, &c. there a bond, covenant, or grant may be made to divers severall persons.

See the first part
of the Institutes,
sect. 66. fol. 52.
Vid. 4 E. 2. tit.
Obligation 16.

(6) And

(6) *And inrolled.*] Albeit the indenture (as hath been said) may be either of parchment or paper, yet the inrolment must be in parchment onely; and so it is expressed in the clause of inrolment by the clerke of the peace, *viz.* That hee shall sufficiently inroll and ingrosse ^b in parchment the same. And so much is implied, when the inrolment is in any of the kings courts of record at Westminster; and so was it adjudged, as M. Plowden cited it before the lords in parliament, *anno* 23 Eliz. in the great case between Herbert and Vernon, which I heard, and observed.

A deed knowledged by the husband and wife shall by the common law be inrolled onely for the husband, and not for the wife, by reason of the coverture, and though it be inrolled for both, it bindeth her not. Otherwise it is by custome, and none hath power to examine a feme covert without writ. 29 H. 8. tit. Faits inroll' Br. 14. 7 E. 4. 5. *Vid.* 34 H. 8. ca. 22. 18 E. 3. 29. 45. aff. 8. 14 E. 3. execution 73. 19 R. 2. estoppel 281. 21 E. 3. 43. 24 E. 3. 64. 21 Eliz. Dyer, fol. 363. Kelwey 12 H. 7. fol. 4. &c. 12 H. 4. 12. 29 H. 8. faits inroll Br. 15. lib. 10. Mary Portingtons case, fol. 42.

If an infant acknowledgeth a recognizance, statute merchant, statute staple, or obligation in the nature of a statute staple, or inroll an obligation, in all these cases he must avoid it in an *audita querela*, during his minority; for it must be tryed by inspection, and these concerne but personall duties. But if an infant bargain and sell lands which are in the realty by deed indented and inrolled, he may avoid it when he will; for the deed was of no effect to raise an use: and this statute is to be intended of lawfull and effectuall bargaines and sales, and such as would have raised uses at the common law, and doth onely restraints the execution of them that be of effect, except the deed be inrolled. And this standeth with the reason of the common law; that none but effectuall deeds ought to be inrolled; and therefore a deed of feoffment ought not to be inrolled before livery. But in case of a fine the infant must reverse it during his minority: for the consuance is taken by force of the kings writ before a judge, and is voidable by the common law.

That upon a bargain and sale by deed indented and inrolled, a rent may be reserved, for the use and possession passeth *tanquam uno statu*. See lib. 2. fol. 54. in Sir Hugh Cholmleys case.

(7) *In any of the kings courts of record at Westminster.*] That is, in the kings bench, the chancery, the common pleas, and the exchequer. And though the words be, at Westminster, for that at the time of the making of this act, these courts were there; yet if these be adjourned into another place, the inrolment may be in any of these courts; for the inrolment is confined to the courts, where-soever they be holden.

(8) Or else in the same county, &c. before the custos rotulorum, and two justices of peace, and the clerke of the peace, &c.

(9) *Custos rot.*] This officer is a justice of peace, and is of the gift of the lord chancellor, or lord keeper, and he may exercise his office by deputy. He hath the keeping of all bargaines and sales by deed indented and inrolled, and of all the records and rolls of the sessions of peace, and of the commission of peace it selte, and thereof he taketh the name of his office to put him in mind of his duty. He hath the gift of the clerkship of the peace, to exercise

39 E. 3. 39.
40 E. 3. 5.

* Nota.

Vid. Regist. fol.
150. F.N.B.
104. k. Dyer,
7 El. 152. b.
Harrisons case.
7 E. 4. 5. 12 E.
2. audita querela
26. 17 E. 3. 70.
10 E. 3. infant
61. 23 E. 3.
audita querela. 27.
8 H. 6. 30.
15 E. 4. 51.
1 H. 7. 15.
11 H. 7. 5.
48 E. 3. 31.
16 H. 7. 5.
44 E. 3. 7. b.

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37 H. 8. cap. 1.
3 E. 6. cap. 1.

* 9 E. 1. 2.
10 H. 7. 7.

by himfelfe or his deputy, but he continueth no longer in his place, then the *custos rotulorum* doth.

Dyer, 5 El. 218.
Paſch' 4 El. rot.
812. adjudge ſur
demurrer, Pop-
hams caſe.
Lib. int' Coke
fol. 596.
Lib. 5. fo. r. b.
Claytons caſe.

(10) *The ſame inrolment to be had within fix moneths next after the date of the ſume writing indented.*] The fix moneths ſhall be accounted after the computation of 28 dayes to the moneth. After the date, and after the day of the date upon this act is all one; ſo as the date it ſelfe is taken excluſive. And yet in the report of juſtice Dalifon it is ſaid, that it was holden *anno* 4 Eliz. that if it be inrolled the ſame day it beares date, it is ſufficient; but the ſafer way is to inroll it after the day of the date. And yet where it hath a date, and is delivered after, it ſhall take effect to paſſe from the bargainor from the delivery; for then it became his deed, and not from the date: but the deed muſt be inrolled within fix moneths after the date.

Lib. 5. fol. 1. b.
Claytons caſe,
ubi ſup. adjudge
Trin' 21 Eliz.
in comuni
banco 6 E. 6.
ſaits inrol Br. 9.
per les juſtices.

Every deed ſhall be intended to be delivered on the ſame day that it beares date, unleſſe the contrary be proved. And it is the beſt courſe (according to the intendment of law) to deliver it the ſame day that it beares date. But if the deed indented hath no date, then the day of the delivery is the day of the date of that deed, and may be inrolled within fix moneths after the delivery. And when the deed is inrolled within the fix moneths, then it paſſeth from the delivery of the deed. And albeit after the delivery and acknowledgement, either the bargainor or the bargainee dye before inrolment, yet the land paſſeth by this act; for the words thereof be: No manors, lands, tenements, or hereditaments ſhall paſſe of any eſtate of inheritance or freehold, * except the deed be inrolled. So as by the common law and the ſtatute of 27 Hen. 8. of uſes, it ſhould have paſſed. And by the words of this ſtatute, when the deed is inrolled, it paſſeth *ab initio*.

* Nota, except
is more then
unleſſe.

Trin' 42 Eliz.
rot. 1037. in
communi banco
in repl.

Between Andrew Mallery plaintife, and Jennings and others defendants, the caſe was this: one Sewſter was ſeiſed of certaine lands in fee, and knowledged a recognizance to Turner, whoſe executrix brought a *ſcire fac'* upon the recognizance bearing date the 9 day of November, *an.* 41 Eliz. againſt Sewſter, and alledged him to be ſeiſed of the ſaid lands *in dominico ſuo, ut de feodo*, the day of the *ſcire fac'* brought, which was traivered by the other party. And the truth of the caſe, being by long pleading diſcloſed to the court, was this: Sewſter 7. *die Novemb.* before the recognizance knowledged, by deed indented for money, had bargained and ſold the ſaid land to another, and the deed was inrolled 20 Nov. following. The queſtion was, whether Sewſter was upon the whole matter ſeiſed in fee the 9 day of November, the deed being not inrolled untill the twentieth of the ſame November. And it was adjudged *una voce*, that Sewſter was not ſeiſed in fee of the land the 9 day of November, for that when the deed was inrolled, the bargainee was in judgement of law ſeiſed of that land, from the delivery of the deed. And it was reſolved, that neither the death of the bargainor, nor of the bargainee before inrolment, ſhall hinder the paſſing of the eſtate. And that a releaſe of a ſtranger to the bargainee before inrolment is good. So as it hold not by relation between the parties by fiction of law; but in point of ſtate as well to them as to ſtrangers alſo. And that a recovery ſuffered againſt the bargainee before inrolment (the deed indented being after within the fix moneths inrolled) is good, for that the bargainee was tenant of the freehold in judgement of law at the time

of the recovery. And *non refert*, when the deed indented is knowledged, so it be inrolled within the six moneths. And all this was afterwards affirmed for good law by the court of common pleas Trin' 3 Jac. regis, upon a speciall verdict given in an *ejectione firmæ* betweene Lellingham plaintife of the demise of Thomas Fitzherbert esquire, and Alsop defendant: and further, it was there resolved, that if the bargaine of land after the bargaine and sale, and before the inrolment doth bargaine and sell the same by deed indented and inrolled to another; and after the first deed is inrolled within the six moneths, the bargaine and sale by the bargaine is good: but there in the principall case, in respect of the speciall manner of the penning of the meane bargaine and sale, the court being divided, *viz.* three judges against two, judgement was given against it.

Trin. 3. Jac. in communi banco in eject. firmæ betweene Lellingham plaintife, and Alsop defendant.

The day of the moneth, and the yeare of our Lord and Saviour Christ, and the yeare of the kings raigne are the usuall dates of deeds. And the day of the moneth by the nones, ides, or kalends is sufficient.

(11) *The custos rotulorum, or justices of the peace, and clerke, taking for the inrolment of every such writing, &c. two shillings, &c.*] A good president, when parliaments appoint new labours, &c. that they would also limit and set downe in certaine what fees shall be taken for the same, as here it is done.

(12) *The clerke of the peace shall sufficiently inroll in parchment, &c.*] Of this somewhat hath been said before.

(13) *Shall deliver them to the custos rotulorum.*] For (as hath been said) he is the keeper of the records and rolls of the sessions of the peace of that county.

Provided alwaies that this act, nor any thing therein contained, extend not to any mannor, lands, tenements, or hereditaments, lying or being within any citie, borough, or towne corporate within this realme, wherein the maiors, recorders, chamberlaines, bailifes, or other officer or officers have authority, or have lawfully used to inroll any evidences (14), deeds, or other writings within their precinct or limits: any thing in this act contained to the contrary notwithstanding.

(14) *In any citie, borough, or towne corporate, wherein the maiors, &c. have authority to inroll evidences, &c.*] Resolved by the opinion of the justices of both benches, that a bargaine and sale for valuable consideration of houses, or lands in London, &c. by word onely is sufficient to passe the same; for that houses and lands in any city, &c. are exempted out of this act: and at the common law such a bargaine and sale by word only raised an use. And the statute of 27 H. 8. cap. 10. doth transerre the use into possession.

6 El. Dyer, 229. in Chibberns case.

When the makers of this act had appropriated the inrolment of all indentures of bargaine and sale to the kings foure courts aforesaid, it was necessary to make a provision for cities, &c. which had authority to inroll, and that there such bargaines and sales should be inrolled. *Sed desunt verba:* for by the words, the mannors, lands,

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tenements, and hereditaments are exempted out of the said act, without any provision for inrolment within those cities, &c.

Hill. 20 E. 1. in
chance Rot. 100.
Somerset.

If a deed be shewed in court, or in the custody of the court, and by mischance the seale is broken off, the court shall inroll the deed in court for the availe of the party.

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An Exposition upon the Statute of 32 H. 8.
Cap. 5. Of Executions.

WHEREAS before this time divers and fundry persons have sued executions, as well upon judgements for them given of their debts or damages, as upon such statutes merchants, statutes of the staple, or recognizances, as have been to them before made, recognized, and knowledged; and thereupon such lands, tenements, and other hereditaments, as were lyable to the same execution, have been by reasonable extent to them delivered in execution for the satisfaction of their said debts and damages, according to the lawes of this realme. Nevertheless, it hath been oftentimes seen, that such lands, tenements, and hereditaments so delivered, and had in execution, have been recovered, or lawfully devested, taken away or evicted from the possession of the said recoverers, obligees or recognizees, their executors or assignes, before such time as they have been fully satisfied and payed of their debts and damages, without any manner fraud, deceit, covin, collusion, or other default in the said recoverers, obligees, or recognizees, their executors and assignes, by reason whereof the said recoverers, obligees and recognizees have been thereby set cleerly without remedy, by any maner suit of the law, to recover or come by any such part or parcell of their said debts and damages as was behind, and not by them levied or received, before such time as the said lands, tenements, and other hereditaments so by them had in execution, were recovered, lawfully devested, taken or evicted out of and from their possessions, as is aforesaid, to their great hurt and losse, and much seeming to be against equall justice and good conscience.

For reformation whereof, be it enacted by authority of this present parliament, that if hereafter any such lands (2), tenements, or hereditaments, as be, or shall be had and delivered (3) to any person or persons in execution (1), as is aforesaid, upon any just and lawfull title, matter, condition, or cause (4) wherewithall the said lands, tenements, and hereditaments were lyable, tied, and bound, at such time as they were delivered and taken into execution, shall happen to be recovered, lawfully devested, taken, or evicted (5) out of, and from the possession of any such person

person and persons as now have and hold, or hereafter shall have and hold the same in execution, as is aforesaid, without any fraud, deceit, covin, collusion, or other default of the said tenant or tenants by execution, before such time as the said tenants by execution their executors or assignes (6) shall have fully and wholly levied or received the said whole debt (7) and damages, for the which the said lands, tenements, and other hereditaments were delivered (8) and taken in execution, as is aforesaid: then every such recoverer, obligee, and recognizee shall and may have and pursue a writ of scire facias out of the same court (9), from whence the said former writ of execution did proceed against such person or persons, as the said writ of execution was first pursued, their heires, executors, or assignes of such lands, tenements, or hereditaments, as were or been then liable or charged to the said execution, returnable into the same court at a certain day, being full forty dayes after the date of the same writ.

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At which day if the defendant, being lawfully warned, make default, or appeare and doe not shew and plead a sufficient matter or cause, other then the acceptance of the said lands, tenements, and hereditaments, by the said former writ of execution, to barre, avoid, or discharge the said suit for the residue of the said debt and damages remaining unlevied, or unreceived by the said former execution: then the lord chancellor, or other such justice or justices, before whom such writ of scire facias shall be returnable, shall make estoones a new writ or writs out of the said former record of judgement, statute merchant, statute staple, or recognizance of like nature and effect, as the said former writ of execution was, for the levying of the residue of all such debt and damage, as then shall appeare to be unlevied, unsatisfied, or unpaid of the whole summe or summes in the said former writ of execution contained: any law, custome, or other thing to the contrary hereof, heretofore used, in any wise notwithstanding.

(1) That if hereafter any such lands, tenements, or hereditaments, as be or shall be had and delivered to any person in execution, &c.

(2) *Such lands.*] This hath relation to the preamble, where there are rehearsed foure kinds of executions of those lands, &c. First, upon judgements: 2. upon statutes merchant: 3. statutes of the staple: 4. recognizances. These recognizances bee of two sorts; one, usuall recognizances taken in any of the kings courts of record at Westminster: another, in nature of a statute staple, by the statute of 23 H. 8. cap. 6. This conuisee of the statute staple hereafter in this statute is called obligee, because in them both the seale of the party is put, and the^a tenant by *elegit* upon judgements and recognizances shall hold the land, &c. untill he be answered his debt without mises, costs, &c. But^b tenant by statute merchant, ^c tenant by statute staple, or by recognizance^d in nature of a statute staple shall hold the land, &c. untill his debt be paid together with mises; costs, &c. *Vid.* Regist. 151, 152. 289. F.N.B. 131. Flet. lib. 2. cap. 57. lib. intr' Co. 236. Rast' pl. 542. Dyer

See before the statute of W. 2. cap. 18. and the exposition upon the same.

To what executions this act extendeth unto.

^a By the stat. of W. 2. cap. 8. for Judgements, and cap. 45. for recognizances.

^b By the stat. of Aston Burnel, 11 E. 1. & 13 E. 1. de mercat.

^c H. 4. cap. 12.

^d By the stat. of 27 E. 3 cap. 9. & 22.

^e By the stat. of 23 H. 8. cap. 6.

2 Eliz. 180. b. 37 Hen. 6. 6. 36 H. 6. 2. 2 R. 3. 8. 17. 15 H. 7. 40 E. 3. 28.

(3) *So had and delivered.*] Had, is by *elegit* upon judgements or recognizances, to have the moiety in execution.

Delivered, is by *liberate* upon the other three of the whole land, &c. of the conusor; but after the extent in those three cases (of the statutes, or recognizances in nature of a statute) returned, the conusee may enter without any delivery by the sherife by force of the *liberate*: and he that so entreteth without any delivery is within the aide and benefit of this act, which speaketh of delivery.

(4) *Upon any just and lawfull title, matter, condition or cause.*] That is, upon some former just and lawfull title, &c. before the judgements, statutes, or recognizances.

(5) *Shall happen to be recovered, devested, taken or evicted.*] By the context of this law, the whole land, &c. had in execution, and the whole interest of the land in execution must be recovered, devested, or evicted for the reasons and causes there expressed.

Execution of a recognizance by *elegit* of lands, &c. of Thomas Camoys was had by two merchants; and afterwards by a former statute the same lands were out of the hands of the said merchants delivered to the former conusee, whereupon the two merchants desired to have execution of other lands of the said Thomas Camoys, *et conceditur*.

A man maketh a lease for yeares, rendring a rent, the lessor ousteth the lessee, and bindeth himselfe in a statute, the land is extended, and delivered to the conusee, the lessee re-enters, this is no eviction within this statute: for it appeareth by the preamble, that the conusee must be cleerly without remedy, &c. but here the conusee shall have the rent reserved, and the reversion.

(6) *Before such time, as the said tenants by execution their executors or assignes, &c.*] Here are administrators, and so through the whole act understood, because they are in equall mischief. And likewise and for the same reason, albeit assignees be named in this branch, yet are they implied throughout this act in branches necessary, where they are not named.

The assignee of parcell is not within this act, as appeareth by that which hath been said; but if there be severall assignees, and the land is evicted from them all, they are within the letter and remedy of this act, because the whole is evicted from them, and they may have a re-extent for the whole debt, according to the words and meaning of this act.

Which case in 46. lib. ass. because it hath been often mistaken, and mis-applied by many, we will truly put the same. A. seised of Blacke acre, and White acre in fee, acknowledgeth a statute merchant to J. and infeoffeth B. of White acre, J. sueth execution of Black acre out of the possession of A. the conusor, and of White acre out of the possession of B. A. conveyeth Blacke acre to C. in fee, J. tenant by statute merchant assigneth his interest to D. C. the assignee of A. sueth a *scire fac'* against D. assignee of J. and tendreth the mony that is behind. D. the defendant pleadeth to the writ, for

Lib. 4. fol. 67.
Fulwoods case.

Lib. 4. fol. 66.
Fulwoods case.

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Hill. 11 E. 3.
coram rege, rot.
93. Norff.

So was it holden
Pasch' 12 El. in
communi banco.

Vid. 46. lib. ass.
tit. scire fac'
134.

See the stat. de
Mercat. 13 E. 1.
Soient liuers al
merchant tous
les biens del det-
tor, et tous
ses terres per
reasonable ex-
tent a tener
jesque a tant que
le dett ferr' levie
pleinment.

Notwithstanding by good construction the conuser shall have a *scire fac'* upon tender of the debt, with mises and coftages; for the land was delivered in nature of a gage, though 17 E. 3. 43. b. and 18 E. 3. 11. seeme to the contrary, but in 21 E. 3. tit. *scire facias* 109. & 47 E. 3. 11. a *scire facias* was granted. 32 E. 3. *scire fac'* 101. the assignee of the conusor shall have the *scire fac'* 6 E. 3. 53. acc'.

that

that C. tenant of the freehold of White acre, whereof execution was also sued of record, is not named in the writ, to whom this suit was as well given, as to the plaintiffe, judgement of the writ, *et non allocatur*; whereby it appeareth by the rule of the court, that any one feoffee may have a *scire fac'*, and tender * the whole money to the tenant by statute merchant, or to his assignee. Another exception was taken to the writ, for that every *scire fac'* ought to be warranted or grounded upon a record, and this *scire fac'* is not grounded upon the record, but maintained upon a suggestion of tending of the money, in which case he ought to have a *venire fac'*, and not this writ of *scire fac'*, *et non allocatur*; whereby it appeareth, that partly upon a record, and partly upon a suggestion (no *scire facias* being granted without some suggestion) the *scire fac'* upon this certainty of the tender was maintainable. Lastly, it was excepted against the writ, that it appeared to the court, that the *scire fac'* was brought by the assignee of Blacke acre, against the assignee of tenant by statute merchant, so as each of them, as well of the one part as of the other, plaintiffe and defendant, were strangers to the record, *et non allocatur*, for that it had been often seen, that this writ did lye as well between strangers, as privies, and the writ of *venire fac'* also to make the conusee, &c. to account, &c. Then doth Belknap of counsell with the defendant put a case upon the statute of Gloc. cap. 3. It is given by statute (saith hee) that if the father alien the right of the mother, that the son and heire of the mother shall not be barred, if he hath not assents by descent, &c. and other lands may after descend to him from his father, that the alienee of the father shall have recovery against him by *scire facias*: but if lands descend to him afterwards from his father, and he alieneth the lands, which he recovered as heire to his mother, the alienee of the father shall not have a *scire fac'* against the alienee of the heire; which opinion is grounded upon these words in the statute, *Donques a vera le tenant, (id est, the alienee of the father) recovery vers luy (id est, the son and heire of the mother) de la seisin son mere, &c.* And therefore Belknap concludeth, that no *scire fac'* lyeth against the alienee in that case, no more here. Whereunto Thorp chiefe justice answereth, although it be so in the case put by Belknap, it is given by the statute, &c. Wherefore (saith Thorp) will you receive the money, or no? Belknap, Yes, if he will tender the mises and costages. Kirton, The mises and costages shall be taxed by the court. Thorp, They shall not: for wee cannot know them: and after he tendred a demy marke for mises and costages, and the other said they were not sufficient, and the court held them sufficient. Thorp demanded, if he would receive the money, or no, for mises and costages, as he tendred, otherwise we will (saith he) re-baile to the party his money. And afterwards he received the same, and the plaintiffe had execution.

These things are necessary to be knowne, for the better understanding of this statute of 32 H. 8.

(7) *Shall have fully and wholly levied or received the said whole debt.*

Although the conusee have received the whole debt by execution upon the statute merchant, statute staple, or recognizance in the nature of a statute staple, yet cannot the conusor enter; for he must hold the land untill he be satisfied, not onely of his debt, but of his costs, damages, labours, and expences: otherwise, it is in case of *elegit*, as hath been said, for there after the debt satisfied, the conusor may enter: for tenant by *elegit* holdeth the land but untill the debt be satisfied.

* Nota, hereby the land of the other feoffee shall be discharged, when the whole debt is paid.
2 R. 3. 17.
15 H. 7. 15.

Vi. 17 E. 3. 43.
b. 21 E. 3. *scire fac'* 109. 47 E. 3. 11.

Gloc. 6 E. 1. ca. 3.

See the stat. de Mercat. 13 E. 1. ubi sup.

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Vid. lib. 4. fo. 67. in Fulwoods case. 2 R. 3. 8. 17. 15 H. 7. 47 E. 3. fol 11, 12. 44 E. 3. 14, 16.

(8) *For which the said lands were delivered, &c.*] These words are not to be taken literally but according to the meaning of the makers of this law, and ever such construction is to be made, as the party grieved, and in equall mischief may be relieved: and therefore if a feignory consisting of fealty and rent be delivered in execution, and after the rent become secke by surpluse, and after is evicted, he shall have the remedy of this statute: but if a villaine be delivered in execution, and the villaine purchase land in fee, and the tenant by execution enter into the perquisite of the villaine, and after it is evicted, he shall have no remedy by this statute, the cause is apparent.

(9) *Then every such recoverer, obligee, and recognissee shall and may have a writ of seire fac' out of the same court.*] If judgement and execution be awarded in the court of common pleas, and in a writ of error the judgement is affirmed in the kings bench, the tenant by execution may upon eviction have a *seire fac'* out of the kings bench; for it is the same court in equall mischief to the party grieved.

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An Exposition upon the latter Part of the Statute of 32 H. 8. Cap. 28. concerning Discontinuances, &c.

AND moreover, for certaine considerations, be it enacted, by authority aforesaid that no fine, feoffment, or other act or acts hereafter to be made, suffred, or done by the husband onely, of any mannors lands, tenements, or hereditaments, being the inheritance or freehold of his wife, during the coverture between them, shall in any wise be, or make any discontinuance thereof, or be prejudiciall or hurtfull to the said wife, or to her heires, or to such as shall have right, title, or interest to the same, by the death of such wife or wives. But that the same wife or her heires, and such other to whom such right shall appertain, after her decease, shall and may then lawfully enter into all such mannors, lands, tenements, and hereditaments, according to their rights and titles therein: any such fine, feoffment, or other act to the contrary notwithstanding: fines levied by the husband and wife (whereunto the said wife is party and privy) onely except.

See lib. 8. fol. 71, 72. &c. Grenelies case, Dier, 4 & 5 Ph. & Mar. 162. 2 El. 191. b. Hawtries case. 21 El. 363. b.

2 Ph. 4 & 5 El.
proclamation.

We will adde hereunto a notable and a leading case upon this part of the act vulgarly and commonly cited by the name of Beaumonts case; the truth of which was, that Humfrey Foster leased in fee of the site of the monastierie of *Gracedieu int' alia*, gave them to John Beaumont esquire, and Eliz. his wife, and to the heires of their two bodies begotten, the remainder in fee to the said Jo. Beaumont. An. 6 E. 6. John Beaumont levied a fine thereof, with proclamation *come ceo*, &c. to king Ed. 6. his heires and successours: king Ed. 6. *anno regni sui* 7. granted the said site &c. by his letters patents to Francis earle of Huntingdon and his heires in fee farme; after.

afterwards John Beaumont died, after whose death, and within five yeares Eliz. entred, inclaiming her estate; the fee farme rent was behind: Henry earle of Huntingdon, sonne and heire of Francis, having the inheritance of Gracedieu &c. was called into the exchequer for the arrerages of the said fee farme, where all the said case being disclosed in pleading, at the last upon open argument, great deliberation and conference, five points were resolved and adjudged:

First, albeit the king is not named in the act, yet he is bound by the act, because it is made to suppress a wrong, and to give her &c. that right had a more speedy remedy, viz. by entry, where by the common law, she &c. was driven to a reall action, and every * discontinuance worketh a wrong, and the king being Gods lieutenant * cannot doe wrong, and therefore that the entry of Eliz. was lawfull, &c.

Secondly albeit the words of this act be [being the inheritance or freehold of the wife:] and in this case the lands were as well the freehold and inheritance of the husband as of the wife, yet for that it was a beneficiall law to suppress a wrong, and to give the party wronged a speedy remedy, and that it was in equall mischief, it was adjudged to be within this statute: and this point hath been commonly cited in arguments in Westminster-hall, and at moots, &c. by the name of Beaumonts case.

* Thirdly, that the fine with proclamations levied by the husband only, was a barre by the statute of 4 H. 7. because the issue in taile must claime as heire to both of them.

Fourthly, that the state of the wife was changed to an estate for life dispunishable of waste, for that the issue in taile by the fine was disabled to inherit; as if the donees had been divorced *causa conjugunitatis, &c.* whereby the issue was disabled to inherit, the donees should have had but an estate for life: but in that case they shall be punishable for waste, because the estate in taile was never perfect, but defeasible by divorce *ab initio*.

Fifthly, that when Elis. entred upon earle Henry into Gracedieu, &c. and defeated the fee farme during her estate, yet the earle having an estate of inheritance remaining in him, the fee farme rent, which was reserved presently by the kings prerogative, was leviabie upon his other lands during the estate of Elisabeth; for now upon the matter it is as much in the kings case, as if Elisabeth, being in seison of her estate, the king had granted the inheritance after her estate ended to the earle and his heires, reserving the rent presently: but queen Elisabeth, being acquainted with the equity of the case, was pleased by letters patents under the great seale, which we have seen, to exonerate earle Henry of the arrerages, and of the fee farme it selfe, during the continuance of the estate of the said Elis. that had evicted the land from him: which case we have reported the more at large, for that in the collections of my lord Dyer, written with his own hand, which we have seen, reporteth this case, and maketh a question in these words: *si lentre la femme soit congeable per lestatute, eo que le roy nest ly per lestatute*, which was justly omitted out of the print, for that the judgement, as is aforesaid, was given against that private opinion. And it hath been very many times since adjudged in the exchequer, in pleading for the discharge of the debts of Henry earle of Huntingdon, that the entry of the said Elis. was lawfull, divers whereof we have seen.

^a Vi. li. 11. fo.

72. a. Magd.

Colledge case.

Pl. com. 246.

Seignior Berklies case acc^t.

* 13 E. 4. 8. lib.

1. fol. 44. Alten

Woods case acc^t

^a Just. Dalyson

an. 5 El. Dyer,

18 El. 351. acc^t.

Dier 16 El. 362.

6mil. lib. 9. fol.

139. Beaumonts

case.

5 H. 7. 32. by

Brian.

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Lib. 9. fol 139.

ubi supra.

7 H. 4. 16. lib.

9 fol. 139. ubi

sup.

Otherwise it is in the case of a common person, for he shall be exonerated of the rent during the state evicted, because the rent was reserved out of the whole estate.

An Exposition upon the Statute of 32 H. 8. cap. 38. concerning what Marriages be lawfull, and what not.

SEE the first part of the Institutes, sect. 380. fol. 235. a. Parsons case upon this act of 32 H. 8.

For the better understanding whereof, and of this statute, the Levitical degrees are necessary to be set downe in certaine.

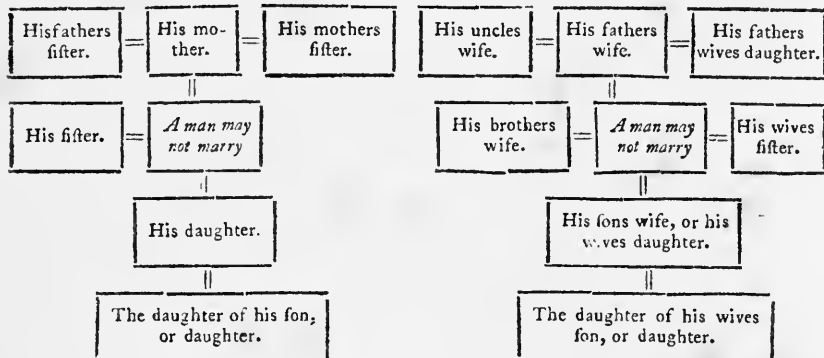
It is to be understood, that by the 18 chapter of Leviticus, not onely degrees of kinred and consanguinity, but degrees of affinity and alliance doe let matrimonic, which may best be illustrated and expresse in this manner:

See these degrees truly set down in the Stat. of 25 H. 8. cap. 22. and 28 H. 8. cap. 7.

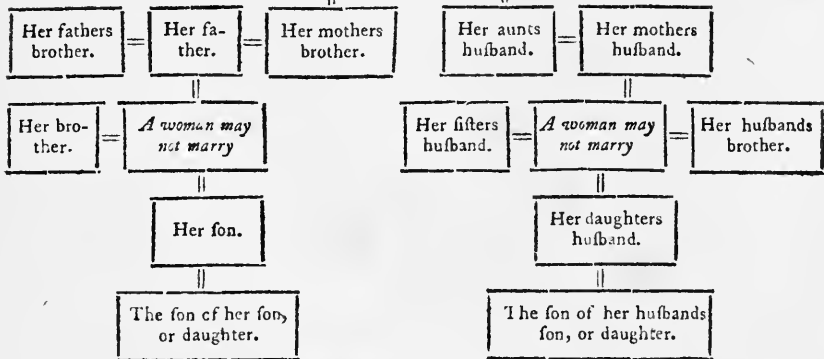
Of the Mans part.

Degrees of Kinred and Consanguinity prohibited.

Degrees of Affinity or Alliance prohibited.



Of the Womans part.



These

These be the Leviticall degrees, which extend as well to the woman as to the man. And herein note, that albeit the marriage of the nephew *cum amita et matertera* is forbidden by the said 13 chapter of Leviticus, and by expresse words the marriage of the uncle with the niece is not thereby prohibited, yet is the same prohibited, *quia eandem habent rationem propinquitatis cum eis qui nominatim prohibentur, et sic de familiis.*

By the preamble of this statute it appeareth, "That by other prohibitions then Gods law admitted for their lucre by that court invented, the dispensation whereof they always reserved to themselves (where there are expressed these examples:) First, as in kinred and affinity between^a cousins germans, and so to the fourth degree. Secondly, ^b carnall knowledge of any of the same kin or affinity before in such outward degrees." But now by this act all persons are declared to be lawfull to contract matrimony, that be not prohibited by Gods law to marry, and that no reservation or prohibition (Gods law excepted) shall trouble or impeach any marriage without the Leviticall degrees. So as without question, the son of the father, by another wife, and the daughter of the mother, by another husband, and *à converso*, may marry. And now at this day men need not to be at that charge and suit that Roger Donington was, who for that he had committed fornication before marriage, with one that was of kin to his wife in the fourth degree, was driven to sue for a ligitimation of his marriage.

See the statute of 1 and 2 Phil. and Mar. cap. 8. a divorce *propter impedimentum publicæ honestatis et justitiæ.*

Neither after this statute can the husband be afraid to lose his wife, or the wife her husband, nor the heire of them to be bastarded, for that the husband before marriage had been godfather either at baptisme, or confirmation to the cousin of his wife, or that she had been godmother before the marriage to the cousin of her husband, for the divorces *causa * compaternitatis et commaternitatis* (which in the act of 1 and 2 Phil. and Mar. is called *cognatio spiritualis*) are by this act taken away; and the divorce *causa professionis* alio, and so is the devorce *causa cognationis legalis*, that is to say, *jure adoptionis, et sic de familiis.*

Alice de Stircheley took to husband William de Chaddeworth, and after, at her suit, was divorced from him, and the cause of the divorce is expressed in the record. *Et fuit causa divorcii eo quod dictus Willielmus de Chaddeworth carnaliter cognoverat quandam filiam dictæ Aliciæ Stircheley, antequam ipsam desponsavit*

By the Leviticall degrees it is prohibited, that a man shall not uncover the nakednesse of his wife, and of her daughter, and so it is of the rest of the degrees there prohibited.

By this act of 32 H. 8. the divorce *causa præcontractus* was taken away, where the marriage was consummate by carnall copulation, &c. but that is repealed, and the divorce allowed by the statute of 2 E. 6. cap. 23. and 1 El. cap. 1.

The residue of the act of 32 H. 8. was repealed by 1 and 2 Phil. and Mar. cap. 8. and revived 1 Elis. cap. 1.

But our chiefe aime and endeavour being to set downe in all the parts of the Institutes, how the law at this day standeth, notwithstanding the change and alteration of many statutes, and the repeales of divers, and after repeales of those repeales, and the reviving of statutes repealed, &c. and having mentioned the divorce

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^a 18 E. 4. 28, 29.
11 H. 4. 76.

^b 24 H. 8. bastard Br. 44.
Vid 28 H. 8. cap. 7. Pasch. 30 E. 1. coram reg^e, Chadworths case in the 1 part Instit. ubi supra.

Vid. Conc. Trid. sess. 24. cap. 2. de reform. Bract. li. 4. 293. b. an. 39 E. 3. fol. 31, 32 in assise. Vid. 10 E. 3. 34, 35. * Bract. ubi sup. 1 & 2 Phil. & M. ca. 8. 47 E. 3. fol. 27. 21 H. 7. Pasch. 32 E. 1. coram reg^e, rot. 83. Nott.

Levit. cap. 18. ver. 17.

Lib. 4. fol. 29. 1. Charles Buntings case, lib. 6. fol. 66. Bracton, lib. 4. fol. 298. b.

causa professionis, it shall be necessary in this place to declare what the law is at this day concerning the marriage of ecclesiasticall persons. And to that end we will report a case resolved, which concerneth not onely the point in question, but another matter of great consequence, which, because the rule and discussing of both points stand in effect upon the same ground of reason, we will relate the whole case :

At the session of parliament holden *anno 4 regis Jacobi*, upon a branch of an act made at the first session in the first year of his majesties reigne, for continuance and reviving of divers statutes, it was enacted, That an act made in the first year of queen Mary, stat. 2. cap. 2. entituled, An act for the repeale of certaine statutes made in the time of king Edw. 6. should stand repealed and void, two doubts were moved: the first concerning the bishops, the second touching the lawfulnessse of ecclesiasticall persons marriages; the first was divided into two questions: the one, Whether any bishop, made especially since the first day of that first session of parliament, were lawfull or no; the other, Whether the proceedings in the bishops, or other ecclesiasticall courts, being made under the name, stile and seale of the bishops, were warranted by law. And the reason and cause of these two doubts was 'this: By the statute of *anno 1 Ed. 6. cap. 2.* it was enacted, That bishops should not be elective, as before that time they had been, but donative by the kings letters patents. Secondly, by the said act it is provided, 'That all summons, citations, and processe in ecclesiasticall courts should be made in the name and stile of the king, and that their processe should be sealed with a seale of the kings armes, &c. And it was strongly urged and enforced, that this act of 1 Ed. 6. was now in force, and consequently, all bishops made (at the least since it became of force) by election, &c. and not by donation, according to the said act of 1 Edw. 6. are unlawfull, and all their processe, proceedings, being in their owne names, stiles and seales (where by the said act they ought to have been in the kings name, and under the kings seale) were all unlawfull, and void. And to prove, that the said act of *anno 1 Edw. 6.* was now in force, they alledged, that this act of 1 Edw. 6. was repealed by the said act of 1 Mar. above mentioned, which act of repeale, being repealed by the said branch of *primo regis Jacobi*, consequently the said act of 1 Edw. 6. was thereby revived: for when an act of repeal is repealed, the first act that was repealed is revived, *remoto impedimento reviviscit statutum*, and herewith agreeth the booke case in 15 Ed. 3. tit' petition, placit' 2. And this is true, and cannot be denied.

The king having understanding hereof, and being informed of the consequents thereof, being matters tending not onely to the infinite prejudice of his subjects in cases of great importance (especially, if any diocesse had no lawfull bishop or ordinary) but to the scandall and impeachment of his majesties justice not onely in those proceedings, but also in administration of justice in certaine cases in his courts of common law at Westminster, commanded his two chiefe justices to consider of the said objections, and to informe him of the true state thereof, that either the scruple conceived might be cleared and satisfied, or the inconvenience (if any were) timely provided for and prevented; who upon diligent consideration had of the said objection, agreed the law to be (as the said case was put) as it had been taken. But upon further
search

search and consideration had, other manifest and direct matters were found to satisfie and cleare the said scruple and question, which afterwards was agreed and resolved accordingly by the chiefe baron and other judges then attending in the upper house of parliament. For the understanding whereof it is to be observed, that the said act of 1 Edw. 6. was repealed by three severall acts of parliament, viz. by the said statute of *anno* 1 Mar. in the whole. 2. By the act of 1 and 2 Phil. and Mar. cap. 8. by sufficient words, as concerning the name, stile, and seale of their processe, &c. And lastly, by the statute of 1 Elis. cap. 1. the whole act of 1 Edw. 6. is also repealed: for *leges posteriores priores contrarias abrogant*. And as a man that is strongly bounden with three cords or ligaments, albeit one or two of them be untied or cut asunder, remaines bound, notwithstanding by and with the second or third, which remaine firme and untouched; so a statute repealed by force of three severall acts remaines repealed, so long as any of them remaine in force, albeit one or two of them be made void: and therefore although the act of 1 Mar. be repealed by 1 *regis Jacobi*, yet the other two acts remaining in force, the act of *anno primo* E. 6. remaine repealed.

First therefore, as to the name, stile, and seale, &c. in ecclesiasticall courts, it is enacted by 1 and 2 Phil. and Mar. cap. 8. in these words:

“ And the ecclesiasticall jurisdiction of the archbishops, bishops, and ordinaries to be in the same state for processe of sutes, punishment of crimes, and execution of censures of the church, with knowledge of causes belonging to the same, and as large in those points as the said jurisdiction was in *anno* 20 Hen. 8.”

By which clause, if the act of repeale of 1 Mar. (now repealed) had never been made, the act of 1 Ed. 6. as to the name, stile, and seale in ecclesiasticall proceedings had been repealed by this latter act of 1 and 2 Phil. and Mar.

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But it was objected, that the said act of 1 and 2 Phil. and Mar. (which is the second cord or ligament) is repealed by the act of 1 Elis. cap. 1. To this it was answered and resolved, that this second cord or ligament remains in force: for true it is, that the act of 1 Elis. repeales the act of 1 and 2 Phil. and Mar. *secundum quid*, but not *simpliciter*; for the act of 1 Elis. doth repeale every branch and article of 1 and 2 Phil. and Mar. other then for such branches as therein be excepted. And afterwards, by another branch of the said act of 1 Elis. it is enacted, That all other lawes and statutes repealed, and made void by the said act of 1 and 2 Phil. and Mar. and not in that act specially mentioned and revived, should stand, remaine, and be repealed and void, as the same were before the making of that act. But the act of 1 Ed. 6. (as it hath been often said) is sufficiently repealed by the act of 1 and 2 Phil. and Mar. as to the name, stile, and seale, &c. and the act of 1 Ed. 6. is not specially mentioned and revived by the act of 1 Elis. so the same remaine repealed by the act of 1 and 2 Phil. and Mar.

The third act which clearly repeales and adnulls the act of 1 E. 6. as well for the making and constituting of bishops, as for the name, stile, and seale of processe, is the act of 1 Elis. cap. 1. for that act doth revive the act of 25 H. 8. cap. 20. and further enacteth, that the same shall stand in full force and effect to all

intents, constructions, and purposes. By which act of 25 H. 8. it is enacted as followeth:

“ And that at every avoidance of any archbishopsrick, or bishopsrick, the king, his heires and successors may grant to the prior and convent, or to the dean and chapter a licence under the great seale, as of old time hath been accustomed to proceed to an election of an archbishop or bishop, with a letter missive, containing the name of the person which they shall elect and choose, &c.” And according to this statute revived by *anno 1 Elis.* all archbishops and bishops at this day be made, and if they were made according to the act of 1 E. 6. they were unlawfull.

And further it is enacted by the said act of 25 H. 8. “ That every person chosen, elected, invested, and consecrated archbishop or bishop, according to the forme and effect of this act, &c. shall doe and execute in every thing and things touching the same, as any archbishop or bishop of this realme, &c. might at any time heretofore doe.”

Which latter branch doth extend to all processe and proceedings in ecclesiasticall courts, and that the same shall be in such sort, as the same were before the act of 25 H. 8. and before that act, the name, stile, and seale of their processe, &c. were as now they be.

And the said act of 1 Elis. reviving the act of 25 Hen. 8. doth impliedly repeale the act of 1 Ed. 6. which had repealed 25 H. 8. in both the said points: for, as by repealing of a repeale, the first act is revived; so by reviving of an act repealed the act of repeale is made of no force.

As to the second point, concerning the marriage of ecclesiasticall persons, it is to be observed, that the intention of the act of repeale of *anno 1 regis Jacobi*, was to repeale the statutes of 2 Ed. 6. cap. 2. and 5 E. 6. cap. 12. concerning the marriage of ecclesiasticall persons, by which stat. of 5 E. 6. it is enacted, “ That the matrimony of all and every priest, and other ecclesiasticall person, shall be adjudged, deemed, and taken, for just, true, and lawfull matrimony, to all intents, constructions, and purposes, and that all children borne in any such matrimony shall be deemed, and judged to all intents and purposes to be borne in lawfull matrimony, and legitimate, and hereditable to lands, tenements, and hereditaments, and that there shall be tenant by the curtesie, and tenant in dower, &c.” But the act of 1 Mar. repealing the said statutes of 1 E. 6. concerning bishops, as of 2 E. 6. cap. 21. and of 5 E. 6. concerning marriages of ecclesiasticall persons, and the statute of 1 *regis Jacobi* repealing generally the statute of 1 Mar. it followeth, that if no other statute had repealed the said act of 1 E. 6. concerning bishops, but the said act of 1 Mar. then all the said three statutes, and 5 E. 6. had remained in force, when the act of 1 Mar. was repealed; but other acts repealing 1 Edw. 6. as before hath appeared, and no other act repealing the acts of 2 and 5 E. 6. concerning marriages, it followeth, that by the repeale of the said act of 1 Mar. the acts of 2 and 5 E. 6. are of force, and that of 1 E. 6. remaine repealed, and is not for the causes above said revived by the statute of 1 *regis Jacobi*.

And it is to be observed, that it appeareth in our bookes, that if a deacon or secular priest had taken wife, the marriage was not void.

void, but voidable, *causa professionis*, and if either party had died before divorce, their issue had been legitimate, and should have inherited, for that deacons and priests within England were not votaries, that is, had not vowed chastity. But if a monk or a nun had married before the statutes of 32 H. 8. cap. 38. and of 2 E. 6. cap. 21. and this act of 5 E. 6. the marriage had been (as it was then holden) merely void, for that they had taken a vow of chastity, as it appeareth by our bookes in 5 E. 2. tit' non habilit' 26 19 H. 7. tit' bastard' 33. 21 H. 7. 39. b. for avoiding of which scruple, the said acts of 32 H. 8. 2 E. 6. and 5 E. 6. were made.

See the Stat. of
31 H. 8. cap. 6.

There be also other divorces which declare the marriage to be void, as a divorce *causa * frigiditatis*, where the party hath *perpetuam impotentiam generationis*, &c. And *b causa metus, five duritie*, also *c causa impubertatis*: these marriages are said to be prohibited by Gods law, otherwise the statute of 32 H. 8. would extend unto them.

Gen. 2. ver. 24.
Mat. 19. 5.
Ephef. 5. 31.
1 Corin. 7. 2.
&c. Mar. 10.
7, 8.
* Dyer 2 Ellif.
118. b. lib. 5.
c 39 E.

fol. 98. Buries case. *b* 11 H. 4. 14. rot. parl. 17 H. 6. nu. 15. Isabel Lady Butlers case. *c* 39 E. 3. 32, 33.

An Exposition upon the Statute of 2 E. 6. Cap. 8. Of Offices.

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WHERE many and divers persons holding, or that have holden lands, tenements, or hereditaments, some for terme of yeares, and some by copie of court roll, have been expelled, and put out of their termes and holds, by reason of inquisitions, or offices founden before eschetours, commissioners, and other, containing tenures of the king in capite, intitling the king to the wardship or custody of such lands or tenements; and sometime intitling the king to the same, upon attainders of treason, felony, or otherwise, by reason that such leases for terme of yeares, or interest by copie of court roll (*1*) of such persons, have not been found in such inquisitions or offices: after which expulsion or putting out, the said persons have been without remedy, for the obtaining of the said fermes, and holds, during the kings possession therein, and can have no traverse, monstrance de droit, nor other remedy for the same, because their said interest is but a chattell in the law, or customary hold, and no estate of freehold. And also, where any person or persons hath any rent, common, office, fee, or other profit apprender of any estate of freehold, or for yeares, or otherwise out of such lands or tenements, specified in such offices or inquisitions, the said rent, common, office, fee, or profit apprender, not found in the same office or offices, such persons are in like manner without remedy to obtaine, or have the said rent, common, office, fee, or profit apprender

apprender by any traverse, or other speedy meane, without greet and excesse charges, during the kings interest therein, by force of such inquisition or office.

Where and in what cases before the statutes of 34 E. 3. cap. 14. and 36 Ed. 3. cap. 13 and 8 H. 6 cap. 19. the party grieved by any office might have had his *traverse*, or *monstrans de droit* by the common law, and where he was driven to his petition, and how; and in what manner, and in what cases the subject was relieved by those statutes. And where before this statute of 2 E. 6. the party was put to his petition, you may read in lib. 4. fol. 54, 55. &c. 24 E. 3. 55. untill the end of the case, adding thereunto, that Mich. 34 & 35 Elis. it was resolved in the court of wards by the two chiefe justices, in the case of the countesse of Rutland, upon consideration had of the said acts of 34 E. 3. 36 E. 3. & 8 H. 6. that he in the remainder expectant upon an estate taile or freehold, or that hath a drie reversion expectant upon any estate of freehold, without any rent or profit, but onely fealty, shall not traverse a false office, finding the dying seised of such a remainder or reversion: for these statutes give a traverse, when the lands are seised by the king, and the party ousted thereof: and the seisin of tenant for life is the seisin of him in remainder or reversion. And the judgement cannot be given, *quod manus domini regis amoveantur*. See Stamf. prerog. 13. he in the reversion may sue livery, &c. Dyer, 14 Elis. 319. Stamf. prerog. 62. a. b.

Lib. 4. fol. 54,
55. &c. Br. tra-
vers 55. Stamf.
prerog.

See 37. aff. p. 11.
4 E. 4. 21.

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(1) *Leases for terme of years, or interest by copie of court roll, &c.* [Upon these words it hath been doubted, whether a tenant by statute merchant, by statute staple, by *elegit*, or executors that have interest in lands by devise for payment of debts, and the like were within this law, because they are not lessees for yeares; but the common opinion is, that these interests are within the purview of this act: for that they are not onely within the same mischief, being without remedy, but within the expresse reason of this law, *viz.* because their said interest is but a chattell reall, and all the abovesaid interests are but chattels realls, *et ratio legis est anima legis. Lex benefici- cialis rei consimili remedium præstat. Quæcunque intra rationem legis inveniuntur, intra ipsam legem esse judicantur.*

7 H. 7. 11.
Vid. 9 H. 6. 21.

29 H. 8. tit. *Travers d' office* 50. A termor could not traverse an office by the common law, but if it were found in the office, he might have a *monstrans de droit*, and so of others that had but chattels realls, 13 E. 4. 8.

But *nota*, though there be a double matter of record to entitle the king to a chattell personall, as an attainder, and an office, that the person attainted was possessed of a horse, the office may be traversed, 34 H. 6. 51. 4 E. 4. 24. 47 E. 3. 26. 13 E. 4. 8. 1 H. 7. fol. because chattels personall are *bona peritura*, and cannot abide the delay of a petition. Vid. W. 1. cap. 4. that goods wrecked be in safety, and kept by the view of the sherifes, &c. and yet such as be *bona peritura* the sherife, &c. may sell them within the yeare.

By the words of the writ of *diem clausit extremum, mandamus, &c.* the escheatour might, according to the common law, seise, &c. before office: but by the statute of Lincolne, anno 29 E. 1. *de Escheatoribus, Vet. Mag. Chart.* 108. and by *Artic' super Chart.* anno 28 E. 1. cap. 19. the escheatour, &c. cannot seise before office, and yet

yet the words of the writs keep their old forme. Here it appeareth, that the king is intituled by office.

For remedy whereof, be it enacted by authority of this present parliament, that where any such office or inquisition is or shall be founden (2), omitting such titles, interests, or matters, as aforesaid, that in all such cases, every lessee, tenant for terme of yeares, or copiholder, and every such person or persons that have, or shall have any interest to any rent, common, or profit apprender, for terme of yeares, life, or otherwise, out of any of the lands, tenements, or hereditaments contained in such office or inquisition, where the king, his heires or successors is, or shall be entituled, as is aforesaid, to any such lands, tenements, or hereditaments, shall have, hold, enjoy, and perceive all and every their leases and interests for terme of yeares, or by copie of court roll, rents, commons, offices, fees, and profit apprender, in such manner, forme, state, and condition, as they and every of them should, or might have done, in case there had been no such office or inquisition found, and as they should or lawfully might, or ought to have done, in case such lease, interest by copie of court roll, rent, common, office, fee, or profit apprender, had been founden in such office or inquisition: any law, custome, or usage to the contrary heretofore used in such cases, in any wise notwithstanding. And also, where it is or shall be founden for the king, his heires or successors, that the heire or heires of his tenant or tenant is, or shall be within age, where in deed such heire or heires is, or shall be at the same time of full age, or of a more or greater age, then is, or shall be contained within such office.

Note this first branch of this beneficial law.

(2) *Where any such office or inquisition is, or shall be found, &c.*] This hath reference to the preamble, and extendeth not onely to offices in case of wardship by tenure *in capite*, but to offices upon attainders of treason, felony, or otherwise. Wherein the generality of these words [or otherwise] are to be observed.

Be it further enacted by the authority aforesaid, that in every such case, such heire and heires, shall and may at his or their very full age, or after, prosecute a writ of *etate probanda* (3), and sue his or their liverie, or *ouster le maine*, as his or their cases shall lye, and have the profits of his or their lands, tenements, or hereditaments, from the time of his or their very full age: any such untrue office or inquisition, or any law or custome to the contrary in any wise notwithstanding. Also where one person or moe is or shall be founden heire to the kings tenant by office or inquisition (4), where any other person is, or shall be heire; or if one person or moe be or shall be founden heire by office, or inquisition in one county, and another person or persons is or shall be founden heire to the same person in another county, or if any person be, or shall be untruly founden lunatick, ideot, or dead.

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The 2. branch.

See 5 E. 4. 3. Stamf. prer. 61. b. 21 R. 2. livery 4. 13 H. 4. 6. 7. Calestens case. 1 H. 7. 3. 14. & 28. Bro. tit. *Office devant Escheator* 27. 40. & *ibid.* 50. Br. tit. *Travers de office* 47. Kelwey, 7 H. 8. fol. 177.

(3) Or *after sue a writ of ætate probanda*, &c.] Or a commission in the nature of an *ætate probanda*, F.N.B. 257. c. d. e. Registr. 294, 295, 296.

See a notable president of an *ætate probanda*, together with the reasons of the jurors. Suff. Hill' 25 E. 1. rot. 14. *coram rege*, Benedict de Blakenhams case.

See Rot. Parl. 40 E. 3. nu. 14, 15. where the heire is found of full age, where in truth he is within age.

(4) *Also where one person or more is, or shall be found heire to the kings tenant by office or inquisition, &c.*] This act is generall, and extendeth as well to offices found *virtute officii* (whereof there was * no interpleader by the common law, because a generall livery could not be sued thereupon: but speciall liveries (now and long since in use) may be sued upon such an office found *virtute officii*) as to offices found *virtute brevis aut commissionis*.

The reason wherefore no generall livery could be sued at the common law upon an office found *virtute officii*, was, *Quia vigilantibus, non dormientibus jura subveniunt*. And the office, whereupon livery is to be granted to the heire, is to be upon an office to be found by writ or commission at the suit of the heire, and the escheator may retorne an office *virtute officii* into the court.

* 30 aff. 28.
Kelwey, 10 H.
8. fol. 198. b.
Stamf. prer. 59.
b. 21 H. 7. fol.
35.
Vid. 32 H. 8.
cap. 46 for the
court of wards.
F.N.B. 232,
233. 29. aff. 43.
16 E. 3. livery
30. 32 E. 3. tra-
vers 38. 32. aff.
28. 50. aff. 2. See the jurisdiction of courts, cap. the court of wards.

The 3. branch.

Be it enacted by the authority aforesaid, that every person and persons grieved, or to be grieved by any such office or inquisition, shall and may have his or their traverse to the same, immediately, or after, at his or their pleasure, and proceed to tryall therein, and have like remedie and advantage, as in other cases of traverse upon untrue inquisitions or offices founden: any law, usage, or custome to the contrary in any wise notwithstanding.

See the statute of Marlbridge, ca. 16. and the exposition thereupon. 2 E. 4. 18. 5 E. 4. 3. 4. F.N.B. 262. 12 E. 4. 18. 2 H. 6. 5. 8 Hen. 7. 118. 11 H. 7. 3. *Vide* Dyer 5 Mar. 161, 162. lib. 7. 45. in Kennes case, this act doth not take away any incidents in law: for if one heire traverse the office of another, he first must have an office found for himselfe, as there it is resolved. *Vid.* 36 E. 3. tit. Travers 44. 12 H. 6. travers 45. 5 E. 4. 4. 1 H. 7. 14. 29 aff. 13. 43 aff. p. 20. 32 H. 6. travers 39. 16 E. 4. 4. F.N.B. 262. Stamf. prer. 58. Kennes case, *ubi supra*, the cause of this word [immediately] to make it cleare that before was *vexata questio*, so as by this an interpleader, as the case shall require, shall be immediatly.

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The 4. branch.

And where it is or shall be hereafter untruly founden by office or inquisition, that any person or persons attainted, or that shall be attainted of treason, felonie, or premunire, is or shall be seised of any lands, tenements, or hereditaments, at any time of such treason, felonie, or offence committed or done, or any time after, whereunto any other person or persons hath, or shall

shall have any just title or interest of any estate of freehold, that then in every such case, every person and persons grieved thereby, shall have his or their traverse, or *monstrans de droit* to the same (1) without being driven to any petition of right: and like remedy and restitution upon his or their title, found or judged for him or them therein, as hath been accustomed and used in other cases of traverse, although the kings majestie, his heires or successors be, or shall be, in such case intituled to any such lands, tenements, or hereditaments, by double matter of record: any law, custome, or usage to the contrary in any wise notwithstanding.

Lib. 4. fol. 57. b. the reason is notably expressed, wherefore in these cases at the common law the party grieved was put to his petition. See 49 Ed. 3. 11. 13 H. 4. 7. 10 H. 6. 15. 4 E. 4. 25. 21 E. 4. 2. 3. 4 H. 7. fol. 7. Stamf. prer. 72, 73. 1 E. 5. 8. Pl. com. 486. Rot. parl. 11 H. 6. nu. 29. John Earle of Somersets case, Br. *travers de office* 51. Vid. 43. ass. p. 28. 33 H. 8. petition Br. 35.

(5) *Shall have his or their traverse, or monstrans de droit to the same, &c.*] Note, that the traverse and *monstrans de droit* are here dis-junctively divided, and by the ninth branch of this act, the party that shall traverse, must sue out one writ or severall writs of *scire facias*, as the case shall require, and that there shall be two writs of search granted upon every traverse, that shall be pursued by vertue or meanes of this act. But *nota*, that proviso extends onely to traverses, and not to any *monstrans de droit* to be pursued by force of this act, either for the suing out of writs of *scire facias*, or that therein writs of search shall be granted, because the *monstrans de droit* doth confesse and avoid the title of the king, and the traverse denieth it, 14 E. 4. 1, 7.

Stamf. prer. 70,
71. simile.

And further be it enacted by the authoritie aforesaid, that where any inquisition or office is or shall be founden (6) by these words, or the like, *Quod de quo, vel de quibus* (7) *tenementa prædicta tenentur, jurat' prædict' ignorant*: or else founden holden of the king, *per quæ servitia ignorant*, or such like; that in such case, such tenure so uncertainly founden, *de quo, vel de quibus tenementa prædicta tenentur, ignorant*, shall not be taken for any immediate tenure of the king; nor such tenure so founden of the king, *per quæ servitia ignorant*, shall not be taken any tenure *in capite*; but in such cases a *melius inquirendum* to be awarded (8), as hath been accustomed in old time; any usage of latter time to the contrarie notwithstanding.

The 5. branch.

(6) *That where any inquisition or office is or shall be found, &c.*] Upon an office found before the escheator, *virtute officii*, there lay no *melius inquirendum* before this act; for the words of the writ be, *per quamdam inquisitionem capt' coram A. eschaetore nostro, &c. de mandato nostro capt'*. F.N.B. 255. Regist. fol. But this act is generall, and giveth it when it is found, *virtute officii*. Vid. 8. H. 6. cap. 16.

Kelwey 199.

(7) *Quod de quo vel de quibus, &c.]* Vide 10 H. 4. 2. b. 13 H. 7. 4. 29 Hen. 8. Br. office 58. & 30 H. 8. ibid. 59.

* (8) *But in such cases a melius inquirendum to be awarded, &c.]* Vide Dyer, 12 Elis. fol. 291. *Si sur le melius tenure est trouve dun common person in certaine, ne besoigne travers.* Dyer 13 Elis. fol. 306. *Si ignoramus soit trouve sur le melius, ceo sera prise tenure in capite. Iffint fuit resolve Mich. 33 & 34 Eliz. per les 2. chiefe justices in le court de gardes.* For this act extends not to the second inquisition upon the melius. And it was then resolved, that he which should traverse such an office, should traverse, that the land was not holden of the king *in capite*; for so much is implied in the office, Dyer 5 Mar. 161, 162.

Dyer 13 Elis. *ubi supra, si sur le melius soit trouve tenure dun roigns ut de manerio, &c. sed per quæ servitia ignorant.* This is a *tenure* by knight-service, as of the mannor. *Vide per melius inquirend'* lib. 8. fol. 168. Paris Stoughters case, & 5 Mar. Dyer 155. b. 156. that no *melius inquirendum* is grantable of any office found *de quo vel de quibus, &c.* before this statute.

The 6. branch.

And be it further enacted by the authoritie aforesaid, that where it is or shall be found by any office or inquisition (9), that any lands, tenements, or hereditaments, are, or shall be descended, remained, or common to any heire within age, and in the kings ward, or that ought to be in the kings ward, and that such lands, tenements, or hereditaments are holden of the king immediately, where in deed the same are, or shall be holden of some other common person (10), and not of the king immediately: that in such case, such heire or heires shall and may have their traverse to the same within age, and like remedie and restitution upon his or their title founden or judged for him, or them therein, as hath been accustomed and used in other cases of traverses: any law, usage, or custome to the contrarie in any wise notwithstanding.

(9) *Where it is, or shall be found by any office or inquisition, &c.]* Note the generality of this clause.

(10) *Shall be holden of some other common person, &c.]* The lord might traverse by the common law. 5 Mar. Dyer 161, 162. but the heire could not before this act. *Vide* 1 H. 7. 3.

The 7. branch.

Also where the kings majestie by his prerogative ought to have as well such lands and tenements as be holden of other persons, as holden of himselfe immediately, whereof his tenant holding of him in chiefe, dyeth seised, his heire being within age, untill such time as liverie be sued (11) by such heire, and that the meane lords, of whom the said other lands and tenements of such heire be holden, used to spare the rents (12) due to them for the same lands or tenements holden of them, during the kings possession. And when such heire hath sued his or their liverie they use by distresse, or otherwise to compell the said heire to pay to them the arrerages of such rents, for such time as the said lands, or tenements were in the kings possession

possession by such minoritie, where they should have sued by petition to the kings majestie, to have obtained the same out of the kings hands, if they would have the same which is to the great detriment, losse, and hindrance of such heire and heires. For redresse whereof, be it enacted by the authoritie of this present parliament, that from henceforth such meane lords, during such minoritie shall have, receive, and take the said rents by the hands of such of the kings officers, as shall be appointed to have, receive, and take the issues, revenues, and profits of the same lands and tenements so holden of such meane lords, during the minoritie and nonage of such heire and heires, and until such heire and heires sue his or their liverie, and that such heire and heires, untill such time as he or they shall have sued their liverie, or might conveniently have sued their liverie, shall be thereof clearly discharged. And that such officer or officers, shall upon request made, pay the same to such meane lords (they giving to such officer and officers a sufficient acquittance, or acquittances for the receipt of the same.) And that such payment thereof made with acquittance, or acquittances thereof shewed, shall be to such officers a sufficient discharge against the kings majestie and his heires, upon his or their accompt in that behalfe: any law, usage, or custome heretofore had, or used to the contrary hereof in any wise notwithstanding.

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(11) *Untill such time as liverie be sued.*] *Nota*, there be two sorts of liveries, *viz.* liveries in deed, and liveries in law. Of liveries in deed there be two kinds, *viz.* a generall livery, and a speciall livery. For a generall livery an office must be found in every county, an *etate probanda* found and returned in the chancery; a writ to the lord privie seale, that the heire is of full age: and thereupon a privie seale to the chamberlaine of England to receive his homage, &c. which kind of livery is dangerous, tedious, and chargeable. Vid. 44 E. 3. 12. 12 H. 4. livery 4. 21 R. 2. livery 5. 1 H. 7. 14. E. 4. 18. 7 H. 8. Kelwey 176, 177.

There is also a speciall livery with a pardon much more safe, speedy and beneficiall for the party, and it may be had upon any office found in any one county, and all the rest to come in by certificate, as now the use is without *etate probanda*, &c. 7 H. 8. Kelwey 177. or without any office at all, and may be made to the heire within age, 21 E. 3. 40. 29 H. 8. livery Br. 56.

By the statute of 33 H. 8. cap. 22. power is given to the master of the wards, surveyor, attorney, and receiver, or three of them, whereof the master or surveyor to be one, to grant a generall or speciall livery. Whereupon some have thought, that speciall liveries became commonly to be granted; but it appeareth by 7 H. 8. *ubi supra*, that it was so commonly used by a good time then past. Dyer, 23 Elis. fol. 377. a speciall livery is not grantable at this day *ex debito justitiæ*.

If the office be traversed, and the king, hanging the traverse, grant livery, &c. the traverse goeth to the ground. Kelw. 2 H. 8. 157. a. b. 1 H. 7. 12. 27. adjudged. See Dyer, 23 Elis. *ubi supra*.

13 H. 4. 6. 7. tit Travers, an office is found, that A. died seised of the mannor of B. and held the same *in capite* by knights-service

his heire within age; this office is traversed, that A. infeoffed him that traverseth in fee, and traverse the dying seised: whereupon the king taketh issue, and hanging the traverse, it is found by another office, that the said feoffment was by collusion, and after the issue was found against the king; whereupon, by the rule of the court, the party had judgement, and an *amoveas manum*. For the office, found depending the traverse, shall not grieve the party; for so he might be infinitely vexed: but in a *scire fac'* by the king upon the latter office he shall answer, &c. an excellent case for the benefit and speed of them that are driven to traverse. Vid. 11 H. 4. fol. 8. 13 H. 4. tit. travers 16 et 13 H. 4. tit. livery 21.

* There be also liveries in law, as by pardons, either by act of parliament, or by charter under the great seale, to the heire of the kings tenant *in capite*, be he within age, or of full age. But where some books say, that a pardon of intrusions to such an heire amounts in law to a livery, it is so to be understood, that in the pardon there be words also, that the heire may enter, &c. for a speciall livery is no other, but that the heire *habeat licentiam ingrediendi*, &c.

Note, upon every livery the king hath the value of the land for halfe a yeaere, but upon an *ouster le mayne* the kings hands be amoved without any profit, &c.

(12) *Used to spare the rents, &c.*] Not onely rents, but relieves also were due by the common law, 26 H. 8. 8. 24 E. 3. 24. 29 aff. p. 5. 39 E. 3. relieve 1. Vide Br. tit. Arrerages, pl. 1. & 19. For though there be a kind of suspension of rents, &c. by reason of the kings possession; yet the rents, &c. are due, because the prerogative of the king doth no man wrong, 13 E. 4. 8. &c.

The 8. branch.

Vid. Dier 5 Mar.
155, 156.

Provided alwaies, and it is enacted by the authoritie aforesaid, that this act, or any thing therein contained, shall not in any wise extend to any inquisition or office taken or founden, at any time before the twentieth day of March next coming; nor to hinder, prejudice, or take away the title, interest, or possession of our soveraigne lord the king, or of any other person or persons growne, or comen by vertue, meane, or occasion of any inquisition or office taken, or found before the same day; but that as well our said soveraigne lord the king, as all other person or persons, having any title, interest, or possession by vertue, meane, or occasion of any inquisition or office found before the same day, shall, and may have, hold, and enjoy the same in like manner and forme, as though this act had never been had or made: any thing in the same act to the contrary in any wise notwithstanding.

The 9. branch.

Provided also, and it is enacted by the authoritie aforesaid, that in all such cases, as any person or persons shall be enabled by this act (13) to have any traverse, and shall pursue his or their traverse, that then he or they that shall pursue such traverse, shall sue one writ, or severall writs of *scire facias* (as the case shall require) against all and singular such person and persons, as shall have interest by the king, or by his patentee or patentees, in like manner and form as is requisite upon traverses, or petitions heretofore pursued. And that in every such *scire facias* the

the patentees, or other defendants shall have like pleas and advantages, as they had in any *scire facias*, before this time awarded against any patentee in any case of petition. And also, that upon every traverse that shall be pursued by vertue or meane of this act, in such case as the partie or parties that shall pursue any such traverse, should, by the order of the common lawes of this realme, have been put to sue by petition to the king, there shall be two writs of search granted in manner and forme, as like writs have been granted upon petitions made to the king.

(13) *Shall be enabled by this act, &c.*] Hereof somewhat hath been spoken in the fourth branch. *Vid.* 5 E. 4. 3.

Nota, in many cases two matters of record with necessary averrements shall amount to an office, but thereupon a *scire fac'* is to be granted, wherein the partie may traverse any of the materiall averrements, &c. 21 ass. p. 36. 21 E. 3. liverie. 40 ass. 46. 50 ass. 2. 2 E. 3. 10. b. but because such records amounting are not within any branch of this act, we will speak no further of them.

Provided also, and it is enacted by the authoritie abovesaid, that if after any judgement shalbe given upon any traverse (9) that shalbe tendred, or sued by vertue or mean of this act, it shal appear by any matter of record, that the king hath any other former title, right, or interest to the mannors, lands, tenements, or other hereditaments mentioned in the same traverse, that then the same title, right, and interest shall be saved to the king, the said traverse and judgement thereupon given, in any wise notwithstanding.

The 10. branch.

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(14) *Upon any traverse.*] This extendeth not to a *monstrans de droit* to be pursued upon this statute.

This proviso was added (for that this act gave a traverse, where none was at the common law, and that it should be judged for them, for whom it was found, &c.) lest the judgement, being warranted by authority of parliament, should bind any former right the king had; and that appeareth also by the conclusion of this branch, *viz.* The said traverse and judgement thereupon given notwithstanding: but it seemeth to be *abundans cautela*, for the judgement upon a traverse is, *quod manus domini regis amoveantur, et possessio restituitur* to him that traverseth *salvo jure, &c.*

Br. tit. Travers
de office 54.

It is to be observed, that there be certaine records which intitle the king, that by law are not traversable; in which cases, though the king be entituled but by single matter of record, yet the party grieved is put to his petition, and cannot be holpen by traverse, or *monstrans de droit*. As taking one example for many: king Henry the fourth recovered in the kings bench in a *quare impedit* against the prior of T. the presentation to a church, and had a writ to the bishop, and his clerke received, &c. where in truth the prior never knew of the suit, nor was summoned, attached, or distrained by the sherife; and thereupon the prior moved the court of kings bench to grant a writ, to cause to come before them the summoners, the pledges, and mainpernors upon the distress to be examined in this

Mich. 10 H. 4.
tit. Travers 51.
Fitz. N.B. 99. f.
Stamf. prer. 73.

matter. And in this case five points were resolved by Gascoigne chiefe justice, and the court, *viz.* first, that the prior was driven to his petition in nature of a writ of deceit, albeit in this case the king recovered in *auter droit*. 2. That if a common person had recovered, the defendant had been driven to his originall writ out of the chancery, and could not proceed upon any judicall processe out of this court. 3. That if the conclusion of the petition be, that the king should command the court of kings bench to proceed to the examination, &c. then without any writ out of the chancery, the court may proceed to the examination. 4. But if the petition doth conclude generally, that the king should doe right, then the prior should be driven to his originall out of the chancery. 5. That before such writ be granted, the prior upon a commission out of the chancery, ought to have his right found by enquest.

But seeing our statute extendeth to offices found by writ, commission, or *ex officio*, and not to other records, we will speak no further of them.

Mine advice to such as shall traverse by force of this act, is, that in the inducement to the traverse, they alledge their owne title, (which they ought to doe; for no man shall have the lands out of the kings hands, without making a title) justly and truly: for the attorney generall for the king may either take issue upon the traverse, or by the kings prerogative upon the title of the party, that traverseth at his choice.

It is a maxime in law, that whensoever any man is by any office traversable amoved from his possession, that he must traverse the office in the court, where the office is returned. Of houses and lands, which doe lye in livery, and whereof there is manuell occupation, and profit presently taken, the party by finding of the office is out of possession; but of rents, villeins, commons, advowsons, and other inheritances incorporeall which lye in grant, the owner is not out of possession (be they appendant, or in grosse) by the finding of an office; and therefore in any information or action brought by the king for the same, the party may traverse the office in that court, where the information or action is brought for the king.

And in all cases, when the king is not in possession by the office, and he obtaine not possession within the yeare after the office found, then cannot the king seize without a *seire facias*.

We have taken this statute of 2 E. 6. into our consideration, the rather, for that justice Stamford wrote his treatise upon the prerogative (wherein he setteth forth the common law) before this statute of 2 E. 6. by which statute the subject is relieved in many things, which lay heaveie upon him, when justice Stamford wrote; our chiefest endeavour being, that it may be knowne how the law standeth at the edition of this second and other parts of the Institutes.

3 H. 4. 14.
13 E. 4. 8.
46 E. 3. Tra-
vers 17.

17 E. 3. 10.
Henry Hills case.
20 E. 4. 11. 14.
21 E. 4. 1. 2.
quare impd.
101. 14 H. 7. 21.
15 H. 7. 6.

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29 aff. p. 40.
32 aff p. 28.
50 aff. 2. Stamf.
prer. 54. b.

An Exposition upon the Statute of 22 H. 8.
Cap. 5. concerning the repairing of decayed
Bridges in Highwaies, and by whom.

BE it enacted by the king our soveraigne lord, and the lords spirituall and temporall, and the commons in this present parliament assembled, and by authoritie of the same, that the justices of peace in every shire of this realme, franchise, citie, or borough, or foure of them at the least, whereof one to be of the quorum, shall have power and authoritie to enquire, heare, and determine in the kings generall sessions of peace, of all manner of annoyances of bridges broken in the high-waies, to the damage of the kings liege people, and to make such processe and paines upon every presentment afore them for the reformation of the same, against such as owen to be charged for the making or amending of such bridges, as the kings justices of his bench use commonly to doe, or as it shall seem by their discretions to be necessary and convenient for the speedy amendment of such bridges.

And where in many parts of this realme it cannot be knowne and proved what hundred, riding, wapentake, citie, borough, towne, or parish, nor what person certain, or bodie politick, ought of right to make such bridges decayed, by reason whereof such decayed bridges, for lacke of knowledge of such as owen to make them, for the most part, lye long without any amendment, to the great annoyance of the kings subjects.

For the remedy thereof, be it enacted by authoritie afore-said, that in every such case the said bridges, if they be without the citie or towne corporate, shall be made by the inhabitants of the shire (1) or riding, within the which the said bridge decayed shall happen to be: and if it be within any citie or towne corporate, then by the inhabitants of every such citie, or towne corporate, wherein such bridges shall happen to be. And if part of any such bridges so decayed happen to be in one shire, riding, citie, or towne corporate, and the other part thereof in another shire, riding, city, or towne corporate; or if part be within the limits of any citie, or towne corporate, and part without; or part within one riding, and part within another: that then in every such case the inhabitants of the shires, ridings, cities, or townes corporate shall be charged, and chargeable to amend, make, and repaire such part and portion of such bridges so decayed, as shall lye and be within the limits of the shire, riding, citie, or towne corporate, wherein they be inhabited at the time of the same decaies.

And be it further enacted, that in every such case, where it cannot be knowne and proved (2) what persons, lands, tenements,

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ments, and bodies politick owen to make and repaire such bridges, that for speedy reformation and amending of such bridges, the justices of peace within the shires or ridings, wherein such decayed bridges been out of cities and townes corporate; and if it be within cities or towns corporate, then the justices of peace within every such citie, or towne corporate, or foure of the said justices at the least, whereof one to be of the quorum, shall have power and authority within the limits of their severall commissions, and authorities, to call before them the constables of every town and parish, being within the shire, riding, city, or town corporate, as well within liberty, as without, wherein such bridges, or any parcell thereof shall happen to be, or else two of the most honest inhabitants within every such towne or parish in the said shire, riding, city, or towne corporate, by the discretion of the said justices of peace, or foure of them at the least, whereof one to be of the quorum: and at, and upon the apparances of such constables, or inhabitants, the said justices of peace, or foure of them (3), whereof one to be of the quorum, with the assent of the said constables, or inhabitants (4), shall have power and authority to taxe, and set every inhabitant (5) in any such city, towne or parish, within the limits of their commissions and authorities, to such reasonable aid, and summe of money, as they shall thinke by their discretions convenient and sufficient for the repairing, re-edifying, and amendment of such bridges, and after such taxation made, the said justices shall cause the names and summes of every particular person so by them taxed; to be written (6) in a roll indented (7). And shall also have power and authority to make two collectors of every hundred, for collection of all such summes of money, by them set and taxed, which collectors receiving the one part of the said roll indented under the seales of the said justices, shall have power and authoritie to collect and receive all the particular summes of money therein contained (8); and to distraine every such inhabitant, as shall be taxed, and refuse payment thereof, in his lands, goods, and chattells (9), and to sell such distresse, and of the sale thereof retaine and perceive all the money taxed, and the residue (if the distresse be better) to deliver to the owner thereof (10). And that the same justices, or foure of them, within the limits of their commissions and authorities, shall also have power and authoritie to name and appoint two surveyors, which shall see every such decayed bridge repaired, and amended from time to time, as often as need shall require, to whose hands the said collectors shall pay the said summes of money taxed, and by them received: and that the collectors and surveyors, and every of them, and their executors and administrators, and the executors and administrators of them, and every of them, from time to time shall make a true declaration and accompt to the justices of peace of the shire, riding, citie, or town corporate, wherein they shall be appointed collectors,

lectors or surveyors, or to foure of the same justices, whereof one to be of the quorum, of the receipts, payments, and expences of the said summes of money: and if they, or any of them refuse that to doe, that then the same justices of peace, or foure of them, from time to time by their discretions, shall have power and authoritie to make proceffe against the said collectors and surveyors, and every of them, their executors and administrators, and the executors and administrators of every of them, by attachments under their seales returnable at the general sessions of peace: and if they appeare, then to compell them to accompt, as is aforesaid, or else if they, or any of them, refuse that to doe, then to commit such of them, as shall refuse, to ward, there to remaine without baile or mainprise, till the said declaration and accompt be truly made.

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And where any bridge or bridges lien in one shire or riding, and such persons inhabitants, bodies politick, lands or tenements, which owen to be charged to the making and amending of such bridges, lien and abiding in another shire or riding, or where such bridges been within any citie, or towne corporate, and the persons inhabitants, bodies politick, lands or tenements, that owen to make or repaire any such bridges, lien and been out of the said cities and townes corporate: be it enacted, that in every such case, the justices of peace of the shire, citie, or towne corporate, within the which such decayed bridges, or any part thereof shall happen to be, shall have power to enquire, heare, and determine all such annoyances, being within the limits of their commissions or authorities. And if the annoyance be presented, then to make procefs into every shire within this realme against such as owen to make, or amend any such bridges so presented before them, to be decayed, to the annoyance and let of the passage of the kings subjects, and to doe further in every behalfe in every such case, as they mought doe by authoritie of this act, in case that the persons or bodies politick, lands or tenements, which owen to be charged to the amending or making of such bridges, or any part thereof, were in the same shire, riding, citie, or towne corporate, where such annoyance shall happen to be. And that all sherifes and bailifes of liberties and franchises, shall truly serve and execute such proceffe, as shall come to their hands from the said justices of peace, afore whom any presentment shall be had for any such annoyance, according to the tenour and effect of the said proceffe to them directed, without favour, affection or corruption, upon paine to make such fine as shall be set upon them, or any of them, by the discretion of the said justices.

Provided alway, that this act, nor any thing therein contained, be not prejudiciall to the liberties of the five ports, or members of the same, and for reformation of annoyance of bridges within the said ports and members.

Be it enacted by authoritie of this present parliament, that the warden, maiors, and bailiffes elected, and jurates of the same ports,

ports, and every of them, have power and authoritie to enquire, heare, and determine all manner of common annoyances of bridges within the same ports and members, and to make such proceffe, paines, taxations, and all other things within the same ports and members, as the justices of peace may doe in other shires, or places out of the same ports, by vertue and authoritie of this present act in every behalfe.

And be it further enacted by the authoritie aforesaid, that the justices of peace, or foure of them, shall have full power and authoritie to allow such reasonable costs and charges to the said surveyors and collectors, as by their discretions shall be thought convenient.

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For as much that albeit bridges decayed were amended and repaired, according to the tenour of this act, yet neverthelesse, if speedy remedy for the amendment of the waies next adjoyning to every of the ends of such bridges, should not be had and made, the kings subjects should take little or none availe or commoditie in any parts of this realme by the making of the bridges: in consideration whereof, be it enacted by the king our soveraign lord, and the lords spirituall and temporall, and the commons in this present parliament assembled, and by the authoritie of the same, that such part and portion of the high-waies in every part of this realme, as well within franchise, as without, as lye next adjoyning to any ends of any bridges within this realme, distant from any of the said ends, by the space of three hundred foot, be made, repaired, and amended as often as need shall require. And that the justices of the peace in every shire of this realme, franchise, citie, or borough, or foure of them at the least, whereof one to be of the quorum, within the limits of their commissions and authorities, shall have power and authoritie to enquire, heare, and determine in the kings generall sessions of peace, all manner of annoyances of and in such high-waies, so being and lying next adjoyning to any ends of bridges within this realme, distant from any of the ends of such bridges, three hundred foot, and to doe in every thing and things concerning the making, repairing, and amending of such high-waies, and every of them, in as large and ample manner as they might and may doe, to and for the making, repairing, and amending of bridges, by vertue and authoritie of this present act.

Before we enter into the exposition of this act, we will take into consideration, for a necessary introduction thereunto, what the common law was concerning the reparation of decayed * bridges in three points: First, who were to repaire the same: 2. what was the remedy for the reparation thereof: 3. before what judges.

* Pons significat omne quod super aquas transimus, unde ponticulus.

Nil Tadcaster habet musis aut carmine dignum,

Præter magnificè structum sine flumine pontem.

Vidit et scripsit poeta in ætate.

As to the first some persons spirituall or temporall, incorporate, or not incorporate, are bound to reparaire bridges *ratione tenuræ suæ terrarum, sive tenementorum, &c.* some *ratione præscriptionis tantum, ratione tenuræ*, by reason that they and those, whose estate they have in the lands or tenements, are bound in respect thereof to reparaire the same; ^a but they which have lands on the one side of the bridge, or on the other, or on both, are not bound of common right to reparaire the same.

^b If a man, which holdeth an hundred acres of land, ought to reparaire a bridge by the tenure of them, if he for example alien twenty acres of them to one, and ten to another, and after one of them is onely upon a presentment found thereof, distrained to reparaire this bridge, he shall have a special writ *de onerando pro rata portione, et sic de similibus*.

Ratione præscriptionis tantum, but herein there is a diversity between bodies politicke or corporate, spirituall or temporall, and naturall persons: for ^c bodies politicke or corporate, spirituall or temporall, may be bound by usage and prescription only, because they are locall, and have a succession perpetuall: but a naturall person cannot be bound by act of his ancestor, without a lien, or binding, and assets.

^d *Note*, if a bishop or prior, &c. hath at once or twice of almes repaired a bridge, it bindeth not (and yet is evidence against him, untill he prove the contrary) but if time out of mind, they and their predecessors have repaired it of almes, this shall bind them to it. ^e *De pontibus et calcetis fractis in omnibus transfectionibus quis ea reparare, et sustentare debet.*

^f But admit none at all were bounden to the reparation of the bridge, how then? ^g and by whom should it be repaired by the common law? The answer is, that the whole county, that is, the inhabitants of the county or shire, wherein the bridge is, shall reparaire the same; for of common right the whole county must reparaire it, because it is for the common good, and ease of the whole county.

If a bridge be within a franchise, those of the franchise are to reparaire it. If the bridge be part within a franchise, and part within the gildable, so much as is within the franchise shall be repaired by those of the franchise; and so much as is within the gildable, by those of the gildable. ^h And so it is, if it be in two counties, *mutatis mutandis*.

If a man make a bridge for the common good of all the subjects, hee is not bound to reparaire it; for no particular man is bound to reparation of bridges by the common law, but *ratione tenuræ, or præscriptionis*.

As to the second the remedy was, if it were a private bridge: as to a mill which A. was bound to maintaine, over which B. had a passage, &c. if the bridge were in decay, B. might have his writ *de ponte reparando*. But if the bridge were for the publicke, &c. the remedy was by presentment at the suit of the king, for avoiding of multiplicity of suits.

As to the third, this presentment might be at the common law before the justices of the ⁱ kings bench, or before ^j justices in eire, or ^k commissioners of oier and terminer, or before the sherife by commission, or ^l writ in nature of a commission. ^m But as to the sherife, his power to take inditeaments, by force of any such writ

44 E. 3. 31.
21 E. 4. fol. 46.
5 H. 7. 3.

^a 8 H. 7. 5. b.

^b Regist. 268. a.
F.N.B. 235 b.

^c 21 E. 4. 38. b.
46. 43. aff. 37.
49 E. 3. 5. b.
the prior of
Markiats case.
10 E. 4. 10. a.
& b. in seir' fac'.
19 H. 6. 75. a. b.
^d 10 E. 3. 23, 29.
27. aff. pl. 8.

44 E. 3. 31.
^e Cap. Itineris.
M. 13 E. 3. fo.
73, 74. in libro
meo, the abbot of
S. Austins case.
^f Pasch. 10 E. 3.
28, 29. in the
Maft. of Leo-
nards case.

Vid. Regist. 192.
2 E. 3. coron.
147. 14 E. 3.
stat. 1. cap. 4.
where the whole
county is
amerced.

^g [701]
14 E. 3. tit.
Barre 276. the
bishop of Chesh-
ters case.

^h Regist. 154. a.
F.N.B. 127. c.

8 H. 7. 5.

Regist. 153.
154. F.N.B.
127. d.

ⁱ 21 E. 3. 54.
43. aff. 37.
^j 3 E. 3. aff. 445.
^k 27. aff. p. 8.
^l 33. aff. p. 10.
38. aff. p. 15.
^m 22 E. 3. 1.
ⁿ 14 E. 3. barre
276.
^o Fitz. N.B. fol.
276. c.

29 E. 3. 21.

or commission in the nature of a commission, is taken away by the statute of 28 E. 3. cap. 9. But it may be presented in the ² turne or leet.

See the second part of the Institutes, *Mag. Chart. cap. 15. Nulla villa nec liber homo distringatur facere pontes, &c. nisi qui ab antiquo et de jure facere consueverunt tempore regis Henrici avi nostri.*

For Pontage, *vid.* the second part of the Institutes, Westmin' 1. cap. 31. W. 2. cap. 25. 3 E. 3. aff. 445. 35 H. 6. 29. b. *per* Fortescue, Pl. Com. 334. 407. *Vide* 13 H. 4. 17. F.N.B. 178. f. Flet. lib. 4. cap. 1. *Vid.* 1 H. 8. cap. 9. 39 El. cap. 24.

Pontage is a toll or contribution for repaire of bridges. See a reasonable taxation therefore 39 Elif. cap. 24. See also of Pontage, lib. 8. fol. 46. b. John Webs case.

5 E. 3. 2. 7 H. 4. 3. &c.

It appeareth in our bookes, that before bridges were made how often defaults were saved, and delays had *per cretance del ewe*, by encrease of waters.

39 Elif. cap. 24.

None can be compelled to make new bridges, where never any were before, but by act of parliament.

43 Elif. cap. 16.

9 H. 5. cap. 12,

H. 6. cap. 28.

3 Jac. cap. 24.

ⁿ Inter leges Can-

nuti regis, ca. 10.

& 62.

^a The law before the conquest was, *Oppida pontesque posthac instaurantur.* And againe, *Qui pensionem ad oppida pontesque reficiendos denegabit, militiamve subterfugerit, dabit is regi (si Anglus fuerit) 26. solidos, &c.*

Now having considered what the common law was concerning the reparation of bridges, we will peruse the parts of this act of 22 H. 8. which may be divided into eight branches.

The first branch.

^o Just. of peace

have power to

enquire of nu-

fances, &c. in

high-waies, by

the statutes of

2 Mar. cap. 8.

5 Elif. cap. 13.

18 Elif. cap. 9.

1. That ^o justices of peace, or any foure or more of them, whereof one to be of the quorum, at the kings generall session of peace, shall have power, and authority (which consisteth in these foure things) first to enquire, heare and determine.

2. Whereof? of all manner nufances of bridges broken in the high-waies, to the damages of the kings liege people. This extendeth only to common bridges in the kings high-waies, where all the kings liege people have, or may have passage, and not to private bridges to mills, or the like. And therefore the inditement upon this statute saith, *Quod P pons publicus et communis situs in alta regia via super flumen, seu cursum aquæ, &c.*

P Pons à pendendo, quia tantquam in aëre pendet.

3. In what place? In every shire of this realme, franchise, citie, or borough.

But this is to be understood, *reddendo singula singulis*, that is to say, 1. in every shire or county where there be foure or more justices of peace, whereof one or more is of the quorum. 2. Franchise, where there be foure or more justices of the peace, and one or more of the quorum. 3. Citie, where be foure or more justices of the peace, and one or more of the quorum. 4. Or borough, where there be foure or more justices of the peace, and one or more of the quorum, and where they keep generall sessions of the peace for such franchises, cities, or boroughes; but for want thereof, the justices of peace of the county shall enquire. But if the franchise, citie, or borough be a county of it selfe, and have not foure or more justices of peace, whereof one or more is of the quorum, no other justices of peace of any other shire or county, have any power by this act to enquire of, hear and determine the decay of bridges there, but such decay must be reformed by such remedies (before specified) as the common law did give; therefore it was necessary

to

to be knowne what the common law was before the making of this statute.

4. Such proceſſe they are to make upon every preſentment afore them, for reformation of the ſame, * againſt ſuch as owen to be charged for the * making or amending of ſuch bridges, as the juſtice of his majeſties bench uſe commonly to doe, or it ſhall ſeem by their diſcretions to be neceſſary and convenient for the ſpeedy amendment of ſuch bridges.

* This whole branch, divided into theſe parts, extendeth only, where ſuch as owen to be charged for

making or amending of ſuch bridges are knowne, and preſented. decayed, &c. it muſt be made againe, and re-edified.

* If the whole bridge be de-

Having provided remedy againſt ſuch as owen to be charged for the making or amending of ſuch bridges, &c. The ſecond and third branches doe provide more ſpeedy remedy, where it cannot be knowne or proved what hundred, riding, wapentake, citie, borough, towne or pariſh, or what perſon certaine, or body politicke ought of right to make ſuch bridges decayed, &c. how the ſame ſhall be repaired. And theſe branches doe conſiſt on three parts.

The 2. and 3. branches.

1. That in every ſuch caſe the ſaid bridges (if they be without city or towne corporate) ſhall be made by the inhabitants of the ſhire or * riding, within which the ſaid bridges decayed ſhall happen to be.

2. And if they be within a city or towne corporate, then by the inhabitants of every ſuch city or towne corporate.

* This was added for Yorkſhire, wherein there are ridings.

3. And if part of any bridges ſo decayed be within ſhire, riding, citie, or towne corporate, or if part be within the limits of any city, or towne corporate, and part without, or part within one riding, and part within another, that in every ſuch caſe the inhabitants of the ſhires, ridings, cities, or townes corporate ſhall be charged and chargeable to amend, make, and repaire ſuch part and portion of ſuch bridges ſo decayed, as ſhall lye and be within the limits of the ſhire, riding, city, or towne corporate, wherein they be inhabited at the time of ſuch decayes. By this part the law is declared by whom ſuch decayed bridges in any ſhire, riding, city, or towne corporate ought to be repaired: a neceſſary claue to be added, for that ſuch decayed bridges may not be within the remedy of the fourth branch: yet the law (who are chargeable) being declared hereby, the remedy ſhall be by the courſe of the common law, which before hath been ſhewed.

(1) *That the inhabitants of the ſaid ſhires, &c.*] The perſons to be charged by this act are comprehended under this only word [inhabitants;] which word is needfull to be explained, being the laſteſt word of this kind.

Fiſt, although a man be dwelling in an houſe in a forraigne county, riding, city, or towne corporate, yet if he hath lands or tenements in his owne poſſeſſion and manurance in the county, riding, city, or towne corporate, where the decayed bridge is, he is an inhabitant, both where his perſon dwelleth, and where he hath lands or tenements in his owne poſſeſſion within this ſtatute. *Nota, habitatio dicitur ab habendo, quia qui propriis manibus, et ſumptibus poſſidet, et habet, ibi habitare dicitur.*

2. If a man dwelleth in a forraigne ſhire, riding, city, or towne corporate, and keepeth a houſe and ſervants in another ſhire, riding, city,

See the ſtatute of 23 H. 8. ca. 2. concerning making of gaoles.

* Vid. li. 5. fol. 66, 67. Jeffreys caſe. ibid. fo. 64. in Clarkes caſe. Vid. 3. Jac. c. 23.

city, or town corporate, he is an inhabitant in each shire, riding, city, or town corporate within this statute.

3. *Ex vi termini.* Every person that dwelleth in any shire, riding, city, or towne corporate, though he hath but a personall residence, yet is he said in law to be an inhabitant, or a dweller there, as servants, &c. But this statute extendeth not to them, but to such as be householders. And this is gathered by the words of the fourth branch of this act, that giveth the distresse, *viz.* and to distraine every such inhabitant, &c. in his lands, goods, and chattels. And besides, it were in a manner infinite and impossible, to tax by the next branch of this act every inhabitant, being no householder.

4. Every corporation and body politicke residing in any county, riding, citie, or towne corporate, or having lands or tenements in any shire, riding, city, or towne corporate, *quæ propriis manibus et jumptibus possident et habent*, are said to be inhabitants there within the purview of this statute.

5. An infant that hath house or lands by discent or purchase, is lyable to this publike charge, and so is the husband of a feme covert.

Now the law being declared who were chargeable to reparaire decayed bridges, where no person, &c. where bound thereunto. The fourth branch, for a more speedy reformation and remedy, provideth and enacteth these fixe things:

1. That in every case, where it cannot be knowne and proved what persons, lands, tenements, and bodies politick owen to make and reparaire such bridges, for the speedy reformation and amendment of such bridges, the justices of peace within the shires or ridings, where such bridges been (being out of cities and townes corporate) and if it be within cities or townes corporate, then the justices of peace in every such city or towne corporate, or foure of the said ^a justices at the least, whereof one to be of the quorum, shall have power and authority within the limits of their severall commissions and ^a authorities, to ^b call before them the constables of every towne or parish, being within the shire, riding, citie, or towne corporate, as well within liberty as without, where such bridges, or any parcell thereof shall happen to be, or else two of the next honest inhabitants within every towne or parish in the said shire, riding, city, or towne corporate, by the discretion of the said justices, or foure of them at the least, whereof one to be of the quorum. But it is good policie, that more then foure justices, &c. doe take upon them the authority committed to them by any branch of this act: for if there be but foure, if any of them dyeth, or be out of the commission, the surviving three have no authority to proceed.

* These words referre as well to the justices of the shires or ridings, as of the cities or townes corporate.

^a Justices of peace in shires and ridings are by commission, in cities and townes corporate for the most part by charter; therefore this word [*authorities*] is used.

^b The first thing the justices are to doe when they are assembled, is to call, &c. if they be present (as commonly they are) at the generall sessions of peace, or else to make warrants to call, &c. before them at a certain day and place, and in those warrants to signifie that it is for a taxation of the inhabitants of the whole county, for reparation of such a bridge.

(2) *Where it cannot be knowne or proved, &c.]* By the context and order of this statute, first, for inquiry at the generall sessions, who ought to reparaire such decayed bridges: and secondly of this branch, where it cannot be knowne or proved (that is, at the generall sessions who owen to reparaire it.) It hath been gravely advised,

• advised, that for the better warrant of these foure justices of peace, inquiry should be made by the great inquest for the body of the county at the generall quarter sessions, who ought to repaire it, and if that cannot appeare upon any prooffe made, then a presentment to be made, that the bridge is in decay. And to conclude, *et ulterius juratores prædicti præsentant, quod prorsus nescitur quæ persona, quæ terræ, siue tenementa, aut corpora politica eundem pontem, aut aliquam inde parcellam ex jure, aut antiqua consuetudine reparare debent, aut consueverunt.* And by this meanes, the foure, or more justices of peace, being judges of record, shall be informed of record, that it cannot be knowne or proved, &c. A safe way for these foure or more of the justices; for to charge the subject without just cause, and not warranted by this act, is a great misprision.

2. At the apparance of such constables or inhabitants, the said justices of peace, or foure of them, whereof one to be of the quorum, with the assent of the said constables or inhabitants, shall have power and authority to taxe, and set every inhabitant in such city, towne, or parish, &c. to such reasonable aide and summe of mony, as they shall thinke by their discretions convenient and sufficient, for the repairing, ^d re-edifying, and amendment of such bridges.

It is not here mentioned by any expresse words, that these foure or more justices must execute their authority of this act in the generall sessions of the peace, as it was in the first branch. See for this in the last branch.

First by whom, and in what manner taxation shall be made.

(3) *Justices of peace, or foure of them, &c.*] That is, in such cities, or townes corporate, where foure justices, &c. be: for if there be not foure such justices, they are not within the remedy of this branch, but (as hath been said) are left to the remedy at the common law.

(4) *With the assent of the said constables or inhabitants.*] So as neither the justices, without such assent, nor the constables or inhabitants, without the justices, can make any taxation by this act.

(5) *To taxe and set every inhabitant.*] *Unumquemque inhabitantium, i. singulos inhabitantes,* so as every one may be taxed by himself, and each one beare his owne burthen. And the taxation cannot be set upon the hundred, parish, towne, &c. for then one or a few might be distrained for the whole. What inhabitant is here meant, we have touched before.

By these words [every inhabitant] all priviledges of exemptions or discharges whatsoever from contribution, for the reparation of decayed bridges (if any were) are taken away, although the exemption were by act of parliament.

See the second part of the Institutes, Magn. Chart. ca. 15.

How the money so taxed shall be collected.

(6) *And after such taxation made, the said justices shall cause the names and summes of every particular person so by them taxed, to be written in a roll indented.*

Note the names and sums of every particular person, so as (as hath been said) the taxation must be severall and particular.

(7) *In a roll indented.*] This is intended of every severall hundred, and they must be inrolled in parchment, and sealed by the said justices, and this to be done presently after the taxation made.

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^d Note, for re-edifying, or new building.

3. (8) *And shall also have power and authoritie to make two collectors of every hundred, for collection of all such summes of money, by them set and taxed, which collectors (viz. of every hundred) receiving the one part of the said roll indented, under the seales of the said justices, shall have power and authoritie, to collect and receive all the particuler summes of money * therein contained.*

* By this it appeareth, that the severall ingrossments must be of the severall summes, &c. in every severall hundred, because the collectors be severall of every severall hundred, and these rolls ingrossed are their severall warrants.

4. (9) *And to distraine every such inhabitant, as shall be taxed, and refuse payment thereof, in his lands, goods, and chattells.]* Hereby foure things are to be observed: first (as hath been said) that the taxation must be severall. 2. That the remedy for levying, is by distresse in his lands, goods, and chattells in any place within that hundred, and to sell such distresse. And this the collectors of that hundred may doe by force of this act. 3. That if upon demand the summe be not paid, albeit the inhabitant doe not expressly refuse, it is a refusal in law. 4. Albeit two collectors be appointed, yet one of them, by the command and consent of the other, may distraine and sell; for this is the distresse and sale of them both.

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5. (10) *And if the distresse be better, to deliver to the owner thereof.]* That is, the surplussage upon the sale; above the summe so distrained for, must be delivered to the owner inhabitant.

6. The residue of this branch, concerning the appointment of two surveyors, and the account of them, and of the two collectors, and other things depending on the same, are evident, and need no explanation.

* The effect of this branch is, that the said justices in every shire, riding, city, or towne corporate, shall make processe respectively into every shire, and other place out of the shire, riding, city, or towne corporate. And that the sherife shall serve the processe, upon paine of such fine as shall be assessed by such justices.

The 6. branch. The sixth branch excepteth the five ports, and provideth remedy, and giveth jurisdiction to the warden, mayors, and bailiffes elect, and jurats of the same ports, to enquire, heare and determine all manner of annoyances of bridges.

The 7. branch. The seventh branch giveth power to the said justices of peace, or foure, or more of them, to allow reasonable costs and charges to the said surveyors and collectors.

The 8. branch. The last branch containeth a law for amendment of high-waies at the end of the bridges, and power given to foure or more justices of peace, whereof one to be of the quorum in every shire, franchise, or borough, to enquire, heare, and determine in the * "kings generall sessions of the peace, all manner of annoyances of and in such high-waies so being and lying, next adjoyning to any ends of bridges within this realm, distant from any ends of such bridges thres hundred foot, and to do in every thing and things concerning the making, repairing, and amending of such high-waies, and every of them, in as large and ample maner, as they might and may do to and for the making, repairing, and amending of bridges, by virtue and authority of this present act."

* Nota.

In the kings generall sessions of the peace, &c.] Hereupon it is collected, that seeing the first branch referreth the proceeding concerning

cerning the decay of bridges to the generall sessions of the peace; and the second branch concerning the calling of the constables, &c. and this last branch referreth the proceeding for the amendment of high-waies at the end of bridges, to the generall sessions of the peace: it is the safest way, and nearest to the meaning of the makers of this law (all the parts thereof being considered) that the justices of peace, where no certain person, &c. is knowne, that ought to repaire any decayed bridge, (and the inhabitants of the whole county are generally to be charged) doe proceed as well for the reparation of the bridges, as of the high-waies at the end of those bridges at the generall sessions of the peace, one of them as it were depending upon the other.

The freehold as well of bridges, as of the high-waies, is in him that hath the freehold of the soile, but the free passage is for all the kings liege people.

See the statutes of 13 Elis. cap. 18. 18 El. cap. 12. & 17. 23 El. ca. 11. 39 El. cap. 24. &c. concerning bridges.

See the ^a statute of 23 Hen. 8. cap. 2. concerning the new erecting of gaoles, which cannot be done without act of parliament. That act had little effect; for that the justices of peace did little or nothing within the time to them prescribed by that act; yet reade it, for it hath divers good provisions in it, and divers of them much like to our act.

A right profitable law was made, *anno* 43 Elis. for commissioners, to enquire for mis-employment of lands, tenements, rents, annuities, profits, hereditaments, goods, chattells, money, and stockes of money given, limited, appointed, or assigned to or for repaire of bridges (*inter alia*) and by their orders to reforme the same, which in some cases is a ready and speedy way, and have wrought good effect. And therefore we will in the next place enumerate and explaine the parts and branches of that act, for the better encouragement and instruction of the commissioners in that behalfe.

^a 23 H. 8. ca. 2. Parliament. 51 E. 3. no. 63. it appeareth that gaoles were to be repaired at the kings charge.

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43 Elis. ca. 4.

A speedy remedy in many cases.

An Exposition upon the Statute of 43 Elis. Cap. 4. concerning Commissioners authorized to enquire of Misemployment of Lands or Goods given to Hospitalls, by their Orders shall be reformed.

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WHEREAS lands, tenements, rents, annuities, profits, hereditaments, goods, chattells, money, and stockes of money, have been heretofore given, limited, appointed and assigned, as well by the queenes most excellent majesty, and her most noble progenitors, as by sundry other well disposed persons; some for reliefe of aged, impotent, and poore people; some for maintenance of sicke and maimed

fouldiers and mariners, schooles of learning, free schooles, and scholars of universities; some for repaire of bridges, ports, havens, cawfies, churches, sea-bankes, and high-waies; some for education and preferment of orphans, some for or towards reliefe, stocke or maintenance for houses of correction; some for marriages of poore maides, some for suppartation, aide, and help of young tradefmen, handy-crafts-men, and persons decayed, and others for reliefe or redemption of prisoners or captives, and for aide or ease of any poore inhabitants, concerning payment of fifteens, setting out of fouldiers, and other taxes: which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stockes of money, neverthelesse have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same. For redresse and remedy whereof, be it enacted by authoritie of this present parliament, that it shall and may be lawfull to and for the lord chancellor, or keeper of the great seale of England for the time being, and for the chancellor of the duchie of Lancaster for the time being, for lands within the county palatine of Lancaster, from time to time, to award commissions under the great seale of England, or the seale of the county palatine, as the case shall require into all or any part or parts of this realme, respectively, according to their severall jurisdictions, as aforesaid, to the bishop of every severall diocesse and his chancellor (in case there shall be any bishop of that diocesse, at the time of awarding of the same commissions,) and to other persons of good and sound behaviour, authorizing them thereby, or any foure or more of them, to enquire as well by the oaths of 12 lawfull men or more of the county, as by all other good and lawfull waies and meanes of all and singular such gifts, limitations, assignments, and appointments aforesaid, and of the abuses, breaches of trusts, negligences, mis-employments, not employing, concealing, defrauding, mis-converting, or mis-government of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stockes of money, heretofore given, limited, appointed, or assigned, or which hereafter shall be given, limited, appointed, or assigned, to or for any the charitable and godly uses before rehearsed. And after the said commissioners, or any foure or more of them (upon calling the parties interested in any such lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stockes of money) shall make enquiry by the oaths of twelve men or more of the said county (whereunto the said parties interested shall and may have, and take their lawfull challenge and challenges) and upon such enquiry, hearing, and examining thereof, set downe such orders, judgements, and decrees, as the said lands, tenements, rents, annuities, profits, goods, chattels, money, and stockes of money, may be duly and faithfully employed, to and for

for such of the charitable uses and intents before rehearsed, respectively, for which they were given, limited, assigned, or appointed, by the donors and founders thereof. Which orders, judgements, and decrees, not being contrary or repugnant to the orders, statutes, or decrees of the donors or founders, shall by the authoritie of this present parliament stand firme and good, according to the tenour and purport thereof, and shall be executed accordingly, untill the same shall be undone or altered by the lord chancellor of England, or lord keeper of the great seale of England, or the chancellor of the county palatine of Lancaster, respectively within their severall jurisdictions, upon complaint by any party grieved to be made to them.

Provided alwaies, that neither this act, nor any thing therein contained, shall in any wise extend to any lands, tenements, rents, annuities, profits, goods, chattels, money, or stockes of money given, limited, appointed, or assigned, or which shall be given, limited, appointed or assigned to any colledge, hall, or house of learning within the universities of Oxford or Cambridge, or to the colledges of Westminster, Eaton, or Winchester, or any of them, or to any cathedrall or collegiat church within this realme.

And provided also, that neither this act, nor any thing therein, shall extend to any citie, or towne corporate, or to any the lands, or tenements given to the uses aforesaid, within any such citie, or town corporate, where there is a speciall government or governours appointed to governe or direct such lands, tenements, or things disposed to any the uses aforesaid, neither to any colledge, hospitall, or free schoole, which have speciall visitors, or governours, or overseers appointed them by their founders.

Provided also, and be it enacted by the authoritie aforesaid, that neither this act, nor any thing therein contained, shall be any way prejudiciall or hurtfull to the jurisdiction of the ordinary, or power of the ordinary, but that he may lawfully in every cause execute and perform the same, as though this act had never been had or made.

Provided also, and be it enacted, that no person or persons that hath or shall have any of the said lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stockes of money in his hands or possession, or doth or shall pretend title thereunto, shall be named a commissioner or a juror for any the causes aforesaid, or being named, shall execute or serve in the same.

And provided also, that no person or persons, which hath purchased or obtained, or shall purchase or obtaine upon valuable consideration of money or land, any estate or interest of, in, to, or out of any lands, tenements, rents, annuities, hereditaments, goods, or chattels that have been, or shall be given, limited, or appointed to any the charitable uses above mentioned, without fraud or covin, having no notice of the same

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charitable uses, shall not be impeached by decrees or orders of commissioners above mentioned, for or concerning the same his estate or interest. And yet nevertheless, be it enacted that the said commissioners, or any foure or more of them, shall and may make decrees and orders for recompence to be made by any person or persons, who being put in trust, or having notice of the charitable uses above mentioned, hath or shall breake the same trust, or defraud the same uses by any conveyance, gift, grant, lease, demise, release, or conversion whatsoever, and against the heires, executors, and administrators of him, them, or any of them, having assents in law or equitie, so farre as the same assents will extend.

Provided alwaies, that this act shall not extend to give power or authoritie to any commissioners before mentioned, to make any orders, judgements or decrees for or concerning any manors, lands, tenements, or other hereditaments, assured, conveyed, granted, or come unto the queens majestie, to the late king Henry the eighth, king Edward the sixth, or queene Mary, by act of parliament, surrender, exchange, relinquishment, escheat, attainder, conveyance, or otherwise. And yet nevertheless, be it enacted, that if any such mannors, lands, tenements, or hereditaments, or any of them, or any estate, rent, or profit thereof, or out of the same, or any part thereof have, or hath been given, granted, limited, appointed, or assigned to or for any the charitable uses before expressed at any time sithence the beginning of her majesties reigne, that then the said commissioners, or any foure or more of them, shall and may as concerning the same lands, tenements, hereditaments, estate, rent, or profit so given, limited, appointed or assigned, proceed to enquire, and to make orders, judgements and decrees according to the purport and meaning of this act, as before is mentioned: the said last mentioned proviso notwithstanding.

And be it further enacted, that all orders, judgements and decrees of the said commissioners, or of any foure or more of them, shall be certified under the seales of the said commissioners, or any foure or more of them, either into the court of the chancery of England, or into the court of the chancery within the countie palatine of Lancaster, as the case shall require respectively, according to the severall jurisdictions, within such convenient time as shall be limited in the said commissions.

And that the said lord chancellor, or lord keeper, and the said chancellor of the dutchy, shall and may, within their said severall jurisdictions, take such order for the due execution of all or any of the said judgements, decrees, and orders, as to either of them shall seem fit and convenient.

And that if after any such certificate or certificates made, any person or persons shall find themselves grieved with any of the said orders, judgements, or decrees, that then it shall and may be lawfull to and for them, or any of them to complaine in that behalfe unto the said lord chancellour, or lord keeper, or to the chancellour

chancellour of the said duchie of Lancaſter, according to their ſeverall jurisdictions, for redreſſe therein. And that upon ſuch complaint, the ſaid lord chancellour, or lord keeper, or the ſaid chancellour of the duchy, may, according to their ſaid ſeverall jurisdictions, by ſuch courſe as to their wiſdomes ſhall ſeem meeteſt, the circumſtances of the caſe conſidered, proceed to the examination, hearing and determining thereof: and upon hearing thereof, ſhall and may adnull, diminifh, alter or enlarge the ſaid orders, judgements and decrees of the ſaid commiſſioners, or any foure or more of them, as to either of them in their ſaid ſeverall jurisdictions ſhall be thought to ſtand with equitie and good conſcience, according to the true intent and meaning of the donors and founders thereof, and ſhall and may taxe and award good coſts of ſuit by their diſcretions, againſt ſuch perſons as they ſhall find to complaine unto them without juſt and ſufficient cauſe of the orders, judgements, and decrees before mentioned, 39 El. 6. 43 El. 9.

Authority is given to the lord chancellour, or lord keeper, and to the chancellour of the dutchy reſpectively, to grant commiſſions under the ſeverall ſeales.

Concerning theſe commiſſions, theſe fixe things are to be obſerved:

Fiſt the number muſt be foure, or more.

2. The commiſſioners to be the biſhop and chancellor of that dioceſſe (if there be a biſhop) and other perſons of good and ſound behaviour.

3. In that commiſſion any foure of them doe ſuffice to make orders and decrees, for therein none is of the quorum.

4. None ſhall be commiſſioners that have any part of the lands, &c. or goods, or chattels, money, or ſtockes in queſtion.

5. The commiſſion is to limit a certaine time, within which the commiſſioners are to order, decree, and certifie.

6. Their authority is to enquire as well by the oath of twelve lawfull men, or more, as by all other good waies and meanes.

Concerning the jurors, or inqueſt of inquiry, theſe two things are to be obſerved:

Fiſt, the parties intereſſed may have and take their lawfull challenge and challenges.

2. None that pretend title to any of the lands, &c. goods or chattels, money, or ſtockes in queſtion, ſhall be a juror, &c.

They are to enquire of all and ſingular gifts, limitations, and appointments of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and ſtockes of money, for 21. charitable uſes in relieving, maintaining, repairing, educating, preferring, marrying, ſupporting, aiding, helping, redeeming and eaſing.

1. For reliefe of aged, impotent, and poore people, 2. for maintenance of ſicke and maimed ſouldiers, 3. ſchooles of learning, 4. free ſchooles, 5. ſcholars in univerſities, 6. and houſes of correction, 7. for repaire of bridges, 8. of ports or havens, 9. of caſties, 10. of churches, 11. of ſea-bankes, 12. and of high-waies,

13. for education and preferment of orphans, 14. for marriage of poore maides, 15. for supportation, aide, and help of young trademen, 16. of handi-crafts-men, and 17. of perions decayed, 18. for redemption or reliefe of prisoners or captives, 19. for ease and aide of any poore inhabitants, concerning payment of fifteenes, 20. setting out of souldiers, 21. and other taxes.

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And the commissioners have power also to enquire of these nine things:

- | | | |
|---|---|--|
| <ol style="list-style-type: none"> 1. Of abuses, 2. Breaches of trust, 3. Negligences, 4. Mis-employments, 5. Not employing, 6. Concealing, 7. Defrauding, 8. Mis-converting, 9. Mis-government, | } | of any lands, tenements, &c. rents, &c. goods, money, &c. given to any of the charitable uses aforesaid. |
|---|---|--|

But this act doth not extend to all lands, &c. nor to all goods and chattels, money, or stockes given to any of the charitable uses aforesaid; but certaine are excepted in these eight severall cases, *viz.*

First, of the colledges, halls, or houses of learning in either of the universities.

2. Of the colledge of Westminster.

3. Of the colledge of Eaton.

4. Of the colledge of Winchester.

5. Of any city, or towne corporate, where there is a speciall governour or governours of such lands, &c.

6. Of any colledge, hospitall, or free schoole, which have speciall visitors, or governors, or overseers, appointed to them by their founders.

7. Of purchasers, having these three qualities: first, for * valuable consideration of money or land: 2. without fraud or covin: 3. having no notice of the same charitable use. But albeit the commissioners cannot make any decree against any such purchasers, yet may they make decrees for reconpence to be made by any person or persons, who being put in trust, or having notice of the charitable uses abovesaid, have or shall breake the said trust, or defraud the same uses by any conveyance, gift, grant, lease, release, or conversion, and against his or their heires, executors and administrators, having assets in law or ^a equity, so farre as the same assets will extend.

8. Of purchasers of lands, tenements, and hereditaments assured, conveyed, or come to queen Elisabeth, Hen. 8. Edw. 6. or queen Mary by act of parliament, surrender, exchange, relinquishment, escheat, attornment, conveyance, or otherwise. But if any such manors, lands, &c. have since the beginning of queen Elisabeths reigne been given, &c. to any of the charitable uses before expressed, then this act doth extend to the same.

Concerning the certificate of the commissioners, these foure things are to be observed:

First, that they certifie their order and decree respectively, either into the court of the chancery of England, or into the chancery of the county palatine of Lancaster, as the case shall require.

2. That

* That is, one
that is able
to do a thing,
and is willing
to do it, and
has the money
to do it, and
the time.

^a Next, assets in
equity, as trusts,
confidences, and
the like.

2. That it ought to be in parchment, under the hands and seals of the commissioners.

3. It must be within the time limited in the commission.

4. That the lord chancellor, or lord keeper, and the said chancellor of the duchy shall and may within their severall jurisdictions take such order for the due execution of all or any of the said judgments, decrees and orders so certified, as to either of them shall seem fit and convenient.

In the remedy for the party grieved with such decrees so certified, these five things are to be considered:

First, that he complaine to the lord chancellour, or lord keeper, or to the chancellour of the duchy, according to their severall jurisdictions for redresse thereof. And this complaint is to be by bill.

2. Upon such complaint, first, they shall respectively by such course, as to their wisdomes shall seem meetest, the circumstance of the case considered, proceed to the examination, hearing, and determining thereof. 2. Upon hearing thereof shall or may admit the whole (which rarely is done) diminish (in part) or enlarge (that is, to confirme the former, and to enlarge the same by adding something thereunto) the judgements and decrees so certified.

3. As shall be thought to stand with equity and good conscience.

4. According to the true intent and meaning of the * donors and founders thereof.

5. And shall and may tax and award good costs of suit by their discretions (respectively) against such persons as shall complaine to them respectively, without just and sufficient cause of the orders, judgements, and decrees before mentioned. But this order being given and limited by act of parliament, no costs (if the order, judgement, or decree be adnulled, diminished, or enlarged) ought to be given to the party complaining.

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* This is the *lapis ductilis*, whereby the commissioners and chancellors must institute their course.

The Exposition of the Statute of 31 Elif. Cap. [713]

12. concerning Sellers of Horses in * Faïres and Markets, &c.

* Forum à ferendo (aut quod sit foris) quia ibidem merces

asportari solent: Latine, Feriæ, quia ibidem merces portantur. Unde *Faires*, or *Faires* Anglice, & *Foire* Gallice. Nundinæ à nono die, &c. *Mart* is derived à mercando, of buying and selling, and so is mercatus alio. Emporium, Græcè *Ἐμπορίον*, quia ibi conveniunt *Ἐμπόροι*, i. Mercatores.

BEFORE we enter into the exposition of this statute, we will consider, first, what the common law was before the making of this statute, 2. what any acts of parliament have wrought in this case, before this act of 31 Elif. 3. we will descend to the exposition of our said act of 31 Elif.

As to the first, the common law did hold it for a point of great policie, and behovefull for the common-wealth, that faïres and markets overt should be replenished, and well furnished with all manner

manner of commodities, vendible in faires and markets, for the necessary sustentation and use of the people. And to that end the common law did ordaine (to encourage men thereunto) that all sales and contracts of any thing vendible in faires or markets overt should not be good onely between the parties, but should bind those that right had thereunto. But this rule hath many exceptions.

35 H. 6. 29. Pl.
Com. 243 Doct.
& Stud. 39. b.

First, it shall not bind the king for any of his goods sold in market overt by any person, but regularly the sale by a stranger in market overt bindeth an infant, a feme covert that hath right either in their owne right, or as executor, or administrator, ideots, *non compos mentis*, men beyond sea, and in prison, that right have to the same.

Lib. 5. fo. 83. b.
Lib. int' Raft.
327. 2 & 3 Ph.
& Mar. cap. 7.
Lib. 5. fo. 83. b.
35 H. 6. 7. simile.

2. Although the faires or markets be overt, yet the sale must be made in a place that is overt and open, not in a backe roome, ware-houfe, &c. as you may reade, lib. 5. fol. 83. b. *case de market overt*.

3. Although it be in an open place, yet overt in this case implies apt and sufficient, as not to sell plate openly in a scriveners shop, or the like, but openly in a goldsmiths shop, &c. lib. 5. fol. 83. *ubi supra*.

12 E. 4. 12. b.
and all the
bookes.

4. It must be a sale, and not a free gift, without any valuable consideration: for faires and markets were not instituted for gifts, but for sales; therefore gift in this act is to be intended of a gift for valuable consideration, and not a free gift.

Doct. & Stud. 64.
b. 33 H. 6. 5.

^a 5. If the buyer doth know whose goods they were, and that the seller thereof hath at the most but a wrongfull possession, this shall not bind him that right hath.

12 H. 8. 10. b.
^a 34 H. 8. 8. Pl.

^b 6. If they be sold by covin between two of purpose to barre him that right hath, this barreth not.

Com. 46. 18 E.
4. 24. lib. 3. fol.

^c 7. If a sale be made of goods by a stranger in a market overt whereby the right of A. is bound, yet if the seller acquireth the goods againe, A. may take them againe, because he was the wrong doer, and he shall not take advantage of his owne wrong.

78. b. in Fer-
mors case, & 83.

8. There must be a sale and contract; and therefore a sale to a man of his owne goods in market overt, bindeth not; and likewise a sale in market overt by an infant of such tenderneffe of age, as it may appeare to the buyer that he is within age, or by a ^d feme covert, if the buyer know her to be a feme covert (unlesse for such things as she usually trades for, or by the consent of her husband) bindeth not. *Et sic de similibus*.

a. in Wind-
hams case.

^e 9. The contract must be originally and wholly made in the market overt, and ^{*} not to have the inception out of the market, and the consummation in the market.

Doct. & St. f. 29.
^b Vid. the books
to the 5.

10. By the common law the property was altered (though some opinions be to the contrary) by sale in market overt, albeit no toll was paid either in respect of the freedome of the faire or market, wherein no toll at all was to be paid, or for that many were discharged of payment of toll, as the king, and some of his subjects by charter, and some by tenure, as ancient demesne, &c. where toll of others was to be taken.

^c 34 H. 6. 10.
& 11.

11. The sale must not be in the night, but between the rising of the sun, and the going downe of the same: for he that hath a faire or market, either by grant or prescription, hath power to hold it

7 E. 4. 15.
32 H. 6. 1.

for

18 E. 4. 6. 24.
9 H. 6. 45.

^d 21 H. 7. 40. b.
Fireux chief

justice. Also for
the feme covert,

vid. Mich. 22 &
23 Elif. ceram

age in action
sur le case, inter

Guiblon &
Thorpeth, Suff.

^e Dyer 1 Mar.
fo. 99. 121.

* [714]
Vid. 9 H. 6. 45.

35 H. 6. 2 & 3
Ph. & Mar. c. 7.

Doct. & St. 39. b.
Lib. int' Raft.

247. divisione
fares, &c.

per unum diem, seu duos, vel tres dies, &c. where (*dies*) is taken for *dies solaris*; for if it should be taken for *dies naturalis*, then might the sale be made at midnight. And yet the sale that is made in the night is good between the parties, but not to bind a stranger that right hath.

12. A. commit a robbery or felony of the goods of B. the officer of the king doth seise the goods (in lawfull manner) to the kings use. B. pursueth his appeale freshly, the kings officer, or any other selleth the goods in market overt; B. pursueth his appeale against A. untill he hath convicted him of the felony, the king shall make him restitution of his goods, notwithstanding the sale in market overt, because of the fresh and diligent suit and pursuit of record, the goods were so protected thereby, and by the kings seisure, that the property of the same, being *tantum in custodia legis*, cannot be altered by sale in market overt. And by the statute of 21 H. 8. cap. 11. it is enacted, that if any felon be of any money, goods, or chattels, and the said felon be indicted, and after arraigned of the same felony, and found guilty, or otherwise attainted, by reason of evidence given by the party so robbed, or owner, or by any other by their procurement, ^a that the party so robbed, or owner shall be restored to his said money, goods, and chattels. And that the justices, &c. have power by this present act to award from time to time writs of restitution, &c. in like manner, ^b as though any such felon were attainted at the suit of the party in appeale.

So as in this case also the party robbed, or owner shall have restitution, notwithstanding any sale in market overt. See the third part of the Institutes, cap. Restitution. And the reason of the law in this case of restitution is, to encourage the owners to pursue the felons, that they might be condignly punished, *ut pœna ad paucos, metus ad omnes perveniat*. And although in this rare case it may be, that one may lose the horse which he came to *bona fide* in market overt; yet *spoliatus debet ante omnia restitui*. And the old rule, *carveat emptor*, doth hold herein: and when two rights come together, the ancient right is to be preferred.

And it is to be observed, that none of these 12 exceptions are abrogated by any act of parliament, but yet remaine in full force.

As to the second, we are to consider the statute of 2 & 3 Ph. & Mar. cap. 7. entituled, Sellers of horses in faires, markets, &c. which (because horse-stealers may flee farre off in a short space) hath made void the sale of horses in market overt in divers cases. The tenour of which act ensueth:

Forasmuch as stollen horses, mares, and geldings, by theeves and their confederates, be for the most part sold, exchanged, given, or put away in houses, stables, backsheds, and other * secret and privie places of markets and faires, and the toll also privily paid for the same, whereby the true owners thereof, being not able to trie the falshood and covin betwixt the buyer and seller of such horse, mare, or gelding, is by the common lawes of this realme without remedy:

Be it therefore enacted by the authoritie of this present parliament, that the owner, governour, ruler, fermor, steward, bailiffe,

See Stat. Pl.
Cor. 365. b.

21 H. 8. ca. 11.
Nota hoc.

^a Note these absolute words for restitution, upon the evidence given upon this act, there needeth no fresh suit to be enquired of, as we know by experience.
^b These words referre only to the manner of the writs of restitution.

2 & 3 Phil. &
Mar. cap. 7.

* Hereby the vulgar people were deceived, but in law this changed no property, as before it appeareth, lib. 5. fo. 83. ubi supra.
The 1. branch.

A certain & special place for the horse-faire.

The 2. branch.
A sufficient person to take toll, & keep the horse-faire from 10 of the clock before noon, till sunset.

The 3. branch.

1. The toll gatherer to receive the toll between these hours.

2. And shall have presently before him the parties to the bargain at the taking of the toll.

3. And the horse, &c.

4. And shall write in a book the names, surnames, & dwelling places of the said parties, & the colour, with one special marke at the least of every such horse, &c.

* The 4. branch.
The toll-gatherer to deliver the book to the owner, &c. of the faire or market.

The 5. branch.
Six points to save the property of the right owner, &c.

1. The horse stolen must be ridden, &c. openly in the faire or market, by the space of an hour, between ten of the clock before noon,

bailiffe, or chiefe keeper of every faire and market overt within this realme, and other * the queenes dominions, shall before the feast of Easter next, and so yearly appoint and limit out a certaine and speciall open place within the towne, place, field, or circuit, where horses, mares, geldings, and colts, have been and shall be used to be sold in any faire or market overt, in which said certaine and open place, as is aforesaid, there shall be by the said ruler or keeper of the said faire or market, put in and appointed one sufficient person or more, to take toll, and keep the same place, from ten of the clocke before noone, untill sun-set of every day of the foresaid faire or market upon pain to lose and forfeit for every default forty shillings.

And that every toll-gatherer his deputy or deputies, shall, during the time of every the said faires and markets, take their due and lawfull tolls, for every such horse, mare, gelding, or colt, at the said open place to be appointed, as is aforesaid, and betwixt the houres of ten of the clocke in the morning, and the sun-set of the same day, if it be tendered, and not at any other time or place, and shall have presently before him or them at the taking of the same toll the parties to the bargain, exchange, gift, contract, or putting away of every such horse, mare, gelding, or colt, and also the same horse, mare, gelding, and colt so sold, exchanged, or put away; and shall then write, or cause to be written in a booke to be kept for that purpose, the names, surnames, and dwelling places of all the said parties, and the colour, with one speciall marke at the least of every such horse, mare, gelding, or colt, on paine to forfeit at and for every default contrary to the tenour hereof forty shillings.

* And the said toll-gatherer, or keeper of the said book, shall within one day next after every such faire or market, bring and deliver his said booke to the owner, governour, ruler, steward, bailiffe, or chiefe keeper of the said faire or market, who shall then cause a note to be made of the true number of all horses, mares, geldings, and colts sold at the said market or faire, and shall there subscribe his name, or set his marke thereunto, upon paine to him that shall make default therein to lose and forfeit for every default forty shillings, and also to answer the partie grieved by reason of the same his negligence in every behalfe.

And be it further enacted by the authoritie aforesaid, that the sale, gift, exchange, or putting away after the last day of February now next coming, in any faire or market overt, of any horse, mare, gelding, or colt, that is, or shall be theevishly stolen, or feloniously taken away from any person or persons, shall not alter, take away, nor exchange the propertie of any person or persons to, or from any such horse, mare, gelding, or colt, unlesse the same horse, mare, gelding, or colt, shall be in the time of the said faire or market, wherein the same shall be so sold, given, exchanged, or put away, openly ridden, led, walked, driven, or kept standing, by the space of one houre together

gether at the least, betwixt ten of the clocke in the morning, and the sun-setting, in the open place of the faire or market, wherein horses are commonly used to be sold, ² and not within any house, yard, backside, or other privie or secret place; ³ and unlesse all the parties to the bargaine, contract, gift, or exchange, present in the said faire or market, shall also come together, and bring the horse, mare, gelding, or colt so sold, exchanged, given, or put away to the open place appointed for the toll-taker, or for the book-keeper, where no toll is due, ⁴ and there enter, or cause to be entred their names and dwelling places in manner as is aforesaid, ⁵ with the colour or colours, and one speciall marke at the least of every the same horses, mares, geldings, or colts in the toll-takers booke, or in the keepers booke for that purpose, whereunto toll is due, as is aforesaid, ⁶ and also pay him their toll, if they ought to pay any, and if not, then the buyer to give one penny for the entry of their names, and executing the other circumstances afore rehearsed, to him that shall write the same in the said booke.

And if any horse, mare, gelding, or colt, that is, or shall be theevishly stollen, or taken away, shall after the said last day of February next coming be sold, given, exchanged, or put away in any faire or market, ^{*} and not used in all points, according to the tenour and intent of this estatute, that then the owner of every such horse, mare, gelding, or colt, shall and may by force of this estatute seise, or take againe the said horse, mare, gelding, or colt, or have an action of detinue or replevin for the same, any sale, gift, exchange, or putting away of any such horse, mare, gelding, or colt, other then according to this estatute in any wise notwithstanding.

The one halfe of all which forfeitures to be to the king and queens majestie, her heires and successeurs, and the other to him or them that will sue for the same before the justices of peace, or in any of the king and queenes majesties ordinary courts of record, by bill, plaint, action of debt, or information; in which suits no protection, essoine, or wager of law shall be allowed.

And be it enacted by the authoritie aforesaid, that the justices of peace of every place and county, as well within liberties, as without, shall have authoritie in their sessions within the limits of their authoritie and commission, to enquire, heare, and determine all offences against this estatute, as they may doe any other matter tryable before them.

Provided alwaies, that in every such faire and market, where any toll is, nor shall be due, ne leviable by reason of the freedom, liberty, or priviledge of the said faire or market, the keeper or keepers of the booke touching the execution of this present act, shall take nor exact but one penny upon and for every contract, for his labour in writing the entry concerning the premises, in manner and forme, as is before declared.

and sun-setting, or else no property shall be altered or changed. This is in assistance of the common law.

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The 6. branch. Which is a ced, fer, as hath been aforesaid, toll is not ever due nor payable by all persons in faires & markets, to the end that the book-keeper may be equivalent in those cases to the toll receivers.

The 7. branch. * This maketh void the sale in faire or market overt, if the horse be not used, &c. in all the said points, according to the tenour and intent of this act. See for these points in the 3, 4, 5, & 6. branches.

The 8. branch.

The penalty to be recovered before justices of peace, &c.

The 9. branch. Justices of peace to heare and determine all offences against this statute.

The 10. branch.

The book-keepers fee for his labour in writing the entry of the contract.

But

But seeing neither the rules of the common-law, nor the provisions of this act wrought so good effect as was expected, therefore a right profitable additionall law was made *in anno 31 reginæ Elizabethæ*, for the saving of the property of horses, mares, geldings, colts, and fillies, to and for the right owners, which hereafter ensueth:

The causes
wherefore
horses, &c. are
so commonly
stolne.

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* 2 & 3 Phil. &
Mar. cap. 7.
Sec 2 E. 3. c. 15.
5 E. 3. c. 3.
27 H. 6. c. 5.

The 1. branch.
Nota, for a further remedy, this is an act of addition, consisting upon six points, for the saving of the property of the right owner.
* A gift, without valuable consideration in market overt, altereth no property, as before hath been said. This statute restraineth the very sale, and maketh it void, if the act be not pursued, and this first branch is in the dis-junctive, unless either the toll-taker or book-keeper shall and will take upon him perfect knowledge, &c. or else that he so selling, or offering to sell, &c. shall bring, &c. one sufficient and credible person, &c. that shall avouch, &c. who vulgarly is called a voucher; and this branch extendeth to all sales of horses, in market overt, whether the horse, &c. be stolne, or not stolne. The 2. branch. That he so selling, &c. cause to be entred the true christian name, and surname, mysterie, and place of dwelling, &c. and the very true price and value. See for the 6th point in the seventh branch.

Whereas through the counties of this realme, horse-stealing is growne so common, as neither in pastures or closes, nor hardly in stables the same are to be in safety from stealing, which ensueth by the ready buying of the same by horse-courfers and others in some open faires or markets farre distant from the owner, and with such speed as the owner cannot by pursuit possibly help the same: and * sundry good ordinances have heretofore been made touching the manner of selling and tolling of horses, mares, geldings, and colts in faires and markets, which have not wrought so good effect for the repressing or avoiding of horse-stealing, as was expected.

Now for a further remedy in that behalfe, be it enacted by the authoritie of this present parliament, that no person after twenty dayes next after the end of this session of parliament, shall in any faire or market, sell, ¹ give, exchange, or put away any horse, mare, gelding, colt, or filly, unlessse ² the toll-taker there, or (where no toll is paid) the book-keeper, bailiffe, or chiefe officer of the same faire or market, shall and will take upon him perfect knowledge of the person that so shall sell, or offer to sell, give, or exchange any horse, mare, gelding, colt, or filly, and of his true christen name, surname, and place of dwelling or resiencie, ³ and shall enter all the same his knowledge into a booke there kept for sale of horses, ⁴ or else that he so selling, or offering to sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, shall bring unto the toll-taker, or other officer aforesaid of the same faire or market, one sufficient or credible person, that can, shall or will testifie and declare unto, and before such toll-taker, book-keeper, or other officer, that he knoweth the party that so selleth, giveth, exchangeth, or putteth away such horse, mare, gelding, colt, or filly, and his true name, surname, mysterie, and dwelling place: ⁵ and there enter, or cause to be entred in the booke of the said toll-taker, or officer, as well the true christen name, and surname, mysterie, and place of dwelling or resiencie of him that so selleth, giveth, exchangeth, or putteth away such horse, mare, gelding, colt, or filly, as of him that so shall testifie or avouch his knowledge of the same person, ⁶ and shall also cause to be entred the very true price or value that he shall have for the same horse, mare, gelding, colt, or filly so sold.

And

* And that no person shall take upon him to avouch, testifie, or declare, that he knoweth the party that so shall offer to sell, give, exchange, or put away such horse, mare, gelding, colt, or filly, unlesse he doe indeed truly know the same party, and shall truly declare to the toll-taker, or other officer aforesaid, as well the christen name, surname, myserie, and place of dwelling and residence of himselfe, as of him, of, and for whom he maketh such testimony and avouchment.

And that no toll-taker, or other person, keeping any booke of entry of sales of horses in faires or markets, shall take or receive any toll, or make entry of any sale, gift, exchange, or putting away of any horse, mare, gelding, colt, or filly, unlesse he knoweth the party that so selleth, giveth, exchangeth, or putteth away any such horse, mare, gelding, colt, or filly, and his true christen name, surname, myserie, and place of his dwelling or residence, or the party that shall and will testifie and avouch his knowledge of the same person so selling, giving, exchanging, or putting away such horse, mare, gelding, colt, or filly, and his true christen name, surname, myserie, and place of dwelling or residence, and shall make a perfect entry into the said booke of such his knowledge of the person, and of the name, surname, myserie, and place of the dwelling or residence of the same person, and also the true price, or value that shall be, bona fide, taken or had, for any such horse, mare, gelding, colt, or filly so sold, given, exchanged, or put away, so farre as he can understand the same, and then give to the party so buying, or taking by gift, exchange, or otherwise, such horse, mare, gelding, colt, or filly, requiring and paying two pence for the same, a true and perfect note in writing of all the full contents of the same, subscribed with his hand, on * paine that every person that so shall sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, without being knowne to the toll-taker, or other officer aforesaid, or without bringing such a voucher or witness, causing the same to be entered as aforesaid, and every person making any untrue testimony or avouchment in the behalfe aforesaid, and every toll-taker, book-keeper, or other officer of faire or market aforesaid, offending in the premises contrary to the true meaning aforesaid, shall forfeit for every such default the summe of five pounds; but also that every sale, gift, exchange, or other putting away of any horse, mare, gelding, colt, filly, in faire or market not used in all points according to the true meaning aforesaid, shall be void: the one halfe of all which forfeitures to be to the queenes majestie, her heires and successors and the other halfe to him or them that will sue for the same before the justices of peace, or in any of her majesties ordinary courts of record, by bill, plaint, action of debt, or information, in which no essoin or protection shall be allowed.

And be it further enacted, that the justices of peace of every place and county, as well within liberties as without, shall have
authoritie

* The 3. branch.
No person take upon him to avouch, unlesse he do indeed truly know, &c.

The 4. branch.
No toll-taker, or book-keeper * shall make any entry, &c. but upon the disjunctive in the first branch.

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The 5. branch.
To give to the party so buying, &c. a true and perfect note in writing, &c. requiring and paying two pence for the same.

* On pain, &c.

To forfeit five pounds.

The penalties to be recovered before justices of peace, &c.

The 6. branch.
Justices of peace to enquire, re. and determine.

authoritie in their sessions within the limits of their authoritie and commission, to enquire, heare, and determine all offences against this statute, as they may doe any other matter tryable before them.

The 7. branch.
Extendeth only
to horses, &c.
that are stolne.
The sixth point
for the saving of
the property of
the right owner.
Albeit this act
be pursued in all
points, yet the
sale in market
overt shall not
take away the
property, &c. if
the owner, &c.
claime within
six moneths, &c.

Two sufficient
witnesses.

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* None can exa-
mine witnesses
in a new man-
ner, without act
of parliament.

Upon payment
of so much money
as was *bona fide*
payed for the
same.

* No man can
give an oath in a
new case, with-
out act of par-
liament.

And be it further enacted, that if any horse, mare, gelding, colt, or filly, after twenty dayes next ensuing the end of this session of parliament, shall be stolen, and after shall be sold in open faire or market, and the same sale shall be used in all points and circumstances as aforesaid: that yet nevertheless, the sale of any such horse, mare, gelding, colt, or filly, within six moneths next after the felony done, shall not take away the property of the owner from whom the same was stolen, so as claime be made within six moneths by the party from whom the same was stolen, or by his executors or administrators, or by any other by any of their appointment, at, or in the towne or parish where the same horse, mare, gelding, colt, or filly shall be found, before the maior or other head officer of the same town or parish, if the same horse, mare, gelding, colt, or filly shall happen to be found in any towne corporate, or market towne, or else before any justice of peace of that county neere to the place where such horse, mare, gelding, colt, or filly shall be found, if it be out of towne corporate, or market towne, and so as prooffe be made within forty daies then next ensuing, by two sufficient witnesses to be produced and deposed before such head officer or justice, (* who by vertue of this act shall have authority to minnister an oath in that behalfe) that the property of the same horse, mare, gelding, colt, or filly so claimed, was in the party, by, or for whom such claime is made, and was stolen from him within six moneths next before such claime of any such horse, gelding, mare, colt, or filly, but that the party from whom the said horse, mare, gelding, colt, or filly was stolen, his executors or administrators, shall and may at all times after notwithstanding any such sale or sales in any faire, or open market thereof made, have propertie and power to have, take againe, and enjoy the said horse, mare, gelding, colt, or filly, upon payment or readinesse, or offer to pay to the party that shall have the possession and interest of the same horse, mare, gelding, colt, or filly, if he will receive and accept it, so much money as the same party shall depose and sweare before such head officer, or justice of peace (* who, by vertue of this act, shall have authoritie to minnister and give an oath in that behalfe) that hee paid for the same bona fide, without fraud or collusion, any law, statute, or other thing to the contrary thereof in any wise notwithstanding.

This act is but an act (as hath been said) of addition to the common law, and to the act of 2 & 3 Phil. & Mar. cap. 7. all standing in force, and must be pursued.

The 8. branch.
Clay taken
from accessories,
&c. after.

And be it further enacted by the authoritie aforesaid, that after twenty daies after the end of this session of parliament, not
+ only

Onely all accessaries before such felony done, but also all accessaries after such felony, shall be deprived and put from all benefit of their clergy, as the principall by statute heretofore made, is; or ought to be.

So as what by the 12 points of the common law, and what by the 12 points of additions by these two statutes the property of horses, &c. are so preserved, as if the owner be of capacity to understand them (being collected together, and explained by our labours) and be vigilant and industrious to pursue the same, it is almost impossible that the property of the horse, &c. either stolne, or not stolne, should be altered by any sale in market overt by him that is *male fidei possessor*.

And let the owner or ruler of the faire, the toll-taker, or book-keeper, and the avoucher take heed; that they performe the duty enjoyned to them by this statute, otherwise it will be very penall to them. And hereby good direction is given to courratiërs, horse-courfers how they may safely deale.

Hippocomi,
Mangones eque-
rum.

The Exposition of the Statutes of 39 Elis. [720] Cap. 5. and 21 Jac. Cap. 1. concerning the Erection of Hospitals, and Houses of Cor- rection.

BE it enacted by the authoritie of this present parliament, 39 Elis. cap. 5. that all and every person and persons (1) seised of an estate in fee-simple (2), their heires, executors, or assignes (3), at his or their wills and pleasures, shall have full power, strength, licence, and lawfull authoritie at any time during the space of twenty yeares (4) next ensuing, by deed inrolled in the high court of chancerie, to erect (5), found and establish one or more hospitals (6), *maisons de dieu*, abiding places, or houses of correction, at his or their will and pleasure, as well for the finding, sustentation and reliefe of the maimed, poore, needy, or impotent people, as to set the poore to worke, to have continuance for ever (7), and from time to time to place therein such head and members, and such number of poore, as to him, his heires and assignes shall seem convenient: and that the same hospitals or houses so founded (8), shall be incorporated, and have perpetuall successions (9) for ever, in fact, deed, and name, and of such head members, and numbers of poore, needy, maimed, or impotent people, as shall be appointed, assigned, limited, or named by the founder or founders, his or their heires, executors or assignes, by any such deed inrolled: and that such hospitall, *maison de dieu*, abiding place, or house of

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correction, and the persons therein placed, shall be incorporated, named, and called by such name as the said founder or founders, his heires, executors or assignes shall so limit, assigne, and appoint: and the same hospitall, *meafon de dieu*, abiding place, or house of correction so incorporated and named, shall be a body corporate and politick, and shall by that name of incorporation have full power, authority, and lawfull capacitie and abilitie, to purchase, take, hold, receive, enjoy, and have to them and to their successors for ever, as well goods and cattells, as mannors, lands, tenements, and hereditaments, being freehold, of any person or persons whatsoever. So that the same exceed not the yearly value of two hundred pounds above all charges and reprises, to any one such abiding house, hospitall, *meafon de dieu*, or house of correction: and so as the same, or any part thereof be not holden of our soveraigne lady the queene, her heires or successors, immediately in chiefe, or else of our said soveraigne lady the queen, or any other person by knights-service, without licence or writ of *ad quod damnum*, or the statute of mortmain, or any other statute or law to the contrary notwithstanding. And that the same hospitall, *meafon de dieu*, abiding place, or house of correction, and the persons so being incorporated, founded and named, shall have full power and lawfull authoritie by the true name of the incorporation thereof, to sue and to be sued, implead and to be impleaded, to answer and to be answered unto, in all manner of courts and places that now are, or hereafter shall be within this realme, as well temporall as spirituall, in all manner of suits whatsoever, and of what nature and kind soever such suits or actions be or shall be: and that the same hospitall, *meafon de dieu*, abiding place, or house of correction, shall have and enjoy for ever such a common seale or seales, as by the said founder or founders, his or their heires, executors or assignes shall be in writing under his or their hand and seale assigned (10), named or appointed: whereby the same corporation shall or may seale any maner of instrument touching the same incorporation, and the lands, tenements, hereditaments, goods, or other things thereto belonging, or in any wise touching or concerning the same. And further shall be ordered, directed, and visited, placed, or upon just cause displaced (11) by such person or persons, bodies politick or corporate, their heires, successors or assignes, as shall be nominated or assigned by the founder or founders thereof, their heires or assignes, according to such rules, statutes, and ordinances, as shall be set forth, made, devised, or established by the said founder or founders, their heires or assignes, in writing under his or their hand and seale, not being repugnant or contrary to the lawes and statutes of this realme, any law, statute, custome, usage, or other thing whatsoever to the contrary in any wise notwithstanding. And that it shall be lawfull unto the founder or founders, his and their heires or assignes, upon the death or removing of any head or member of any

any such corporation, to place one other in the roome of him that dyeth, or is removed successively for ever.

Provided alwaies, that all leases, grants, conveyances, or estates, to be made by any corporation so to be founded as aforesaid, exceeding the number of one and twenty yeares, and that in possession, and whereupon the accustomed yearly rent, or more, by the greater part of twenty yeares next before the making of such lease, shall not be reserved and yearly payable, shall be void: saving to all persons, bodies politick and corporate, their heires and successors (other then the founders and givers, their heires and successors) all such right, title, claime, possession, rents, services, commons, demands, interest, and profits, which they or any of them shall have, or of right ought to have, of, in or to any the lands, tenements, or hereditaments, hereafter to be given, limited or assigned in forme aforesaid, in as ample manner, as if this statute had never been had or made.

Provided also, that this act, or any thing therein contained, shall not extend to enable any person or persons, being within age, women covert without their husbands, or of *non sane memorie*, to make any such corporation, or to endow the same: any thing in this present act to the contrary thereof in any wise notwithstanding.

Provided alwaies, that no such hospitall, *maison de dieu*, abiding place, or house of correction shall be erected, founded, or incorporated by force of this act, unlesse upon the foundation, or erection thereof, the same be endowed for ever with lands, tenements, or hereditaments of the cleare yearly value of ten pounds by the yeare.

Provided also, and be it further enacted, that no such incorporation to be founded by force of this act, shall at any time hereafter doe or suffer to be done (12) any act or thing, whereby, or by meanes whereof any of the lands, tenements, hereditaments, stocke, goods or chattels of such incorporation, or any estate, interest, possession, or property, of, or in the same, or any of them shall be vested or transferred in or to any other whatsoever, contrary to the true meaning of this act: and that such construction shall be made upon this act as shall be most beneficiall and available for the maintenance of the poore, and for repressing and avoiding of all acts and devices to be invented, or put in ure contrary to the true meaning of this act,
21 Jac. 1. made perpetuall.

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(1) *That all and every person and persons.*] These words regularly doe extend to any body politick or corporate, but not to such as are restrained by any act of parliament to alien, &c. but doth extend to such bodies politick and corporate as may alien: as maiors and comminalties, bayliffes and burgessees, &c. and the like, and to all other persons whatsoever.

See hereafter the proviso to this effect.

See li. 6. fol. 62.

b. 22 E. 3. coron. 276.

Sed abunda is cautela non nocet.

Whereof the hospitals, &c. must be endowed.

This act enables not persons within age, or feme coverts without their husbands, of *non compos mentis*, or any other persons disabled by law, to found, &c.

This is a very beneficial law: for the charges of incorporation, and of the licence of mortmaine in these dayes grow so great by one meanes or other, as it hath discouraged many men to undertake these pious and charitable workes, whereas in former times such workes of piety and charity for the poore did ever passe in *forma pauperis*, and so we hope to see it againe.

(2) *Seised of any estate in fee-simple, &c.*] First, the mannors, lands, tenements, or hereditaments, whereof the endowment is made, must be of an estate in fee-simple, either absolute, conditionall, or qualified. 2. They must be free-hold. 3. They must be of the cleare yearly value of 10 pounds by the yeare, or more, and not exceeding the yearly value of 200 pounds by the yeare above all charges and reprises. 4. They, or any part thereof must not be holden of the king immediately in chiefe, or of the king, or of any other person by knights-service. But if the first indowment be of the yearly value of 10 pounds or more, and under the yearly value of 200 pounds they may purchase (or any may give to them) mannors, lands, tenements, or hereditaments, having the aforesaid foure qualities, untill they have mannors, lands, tenements, or hereditaments, to the yearly value of 200 pounds, above all charges and reprises by force of this act of parliament, without any licence of mortmaine,

But if they be at the time of the foundation or indowment of the yearly value of 200 pounds, or under, and afterwards they become of greater value by good husbandry, rising of prices, sudden accidents, as by escheat, or otherwise, they shall continue good to be enjoyed by the hospitall, &c. albeit they be above the yearly value of 200 pounds: for the yearly value must be accounted within this statute, as it was at the time of the indowment made. Also goods and chattels (reall or personall) they may take of what value soever.

(3) *Their heires, executors, or assignes.*] That is, when the tenant in fee-simple that hath not time to found himselfe, shall appoint his heires, executors, or assignes to doe the same; and yet if he make no appointment, his heires or assignes may doe it.

(4) *During the space of 20 yeares.*] This act is made perpetuall by the statute of 21 Jac. regis. cap. 1. as more at large shall be shewed when we come to it.

(5) *By deed inrolled in the high court of chancery to erect, &c.*] It cannot be erected by any other instrument, conveyance, or assurance, but by deed inrolled in the chancery. This deed need not be inrolled in the chancery within 6 moneths after the date, but at any time after (but the sooner the safer.) And this deed need not to be indented, but a deed poll sufficeth. It is good, if the deed bee in paper, but it must bee inrolled in parchment.

(6) *One or more hospitalls, maisons de dieu, abiding place, or houses of correction.*] The first three are expressed to be for the finding, sustentation and reliefe of the maimed, poore, needy, or impotent people in the dis-junctive. And the fourth, *viz.* the houses of correction, to set the poore to worke.

(7) *To have continuance for ever.*] The founder cannot erect, &c. any of these for yeares, lives, or any other limited time, but for ever.

(8) *And that the same hospitalls, or houses so founded, &c.*] That is, founded by deed inrolled in the chancery.

Fundare is not onely *fundamentum ponere, seu jacerere*, but also *firmare, seu stabilire*.

(9) *Shall be incorporated, and have perpetuall succession, &c.*] And forasmuch as the hospitall, &c. is not properly incorporated, but the persons therein placed, &c. are to be incorporated; therefore it is in the next clause added, *And that such hospitall, meason de dieu*, abiding place, or house of correction, * and the persons therein placed shall be incorporated, named, and called by such name as the said founder or founders, his heires, executors, or assignes shall so (that is, by any such deed inrolled) limit, assigne, and appoint. So as the persons, to be by this act incorporated, must be there placed and named, when the founder giveth them their name of incorporation: for the parliament incorporateth them, and the founder giveth them only their name.

Now it is necessary, for the better furtherance of these godly and charitable works, to set downe a president warrantable by the said acts. And forasmuch as by this act it must be done by deed (which must have writing, sealing, and delivery) and not by a writing only; it is the surest way to have it by deed indented, between the founder of the one part, and A. B. &c. of the other part, which the founder may seale and deliver to A. B. &c. acknowledge it, and cause it to be inrolled in the chancery: for inrolled it cannot be in any other court.

This indenture made the first day of May, in the first yeare of the reigne of our soveraigne lord king Charles, by the grace of God, &c. between A. B. of B. in the county of C. esquire of the one part, and C. D. E. F. &c. of the other part, witnesseth, that whereas the said A. B. of his charitable affection and disposition hath erected and founded certaine buildings and edifices upon a parcell of ground in the parish of F. in the said county of C. lying between the &c. to be an hospitall, for the finding, sustentation, and reliefe of poore and impotent people, to have continuance for ever. And by these presents the said A. B. doth found, erect, and establish the same for an hospitall of poore and impotent people, to have continuance for ever. And according to the power and authority given to the said A. B. by the statute or statutes in that case provided, the said A. B. doth by these presents limit, assigne, and appoint, that the said hospitall, and the poore and impotent persons therein placed, *viz.* D. E. E. F. F. G. &c. to the number of

shall for ever hereafter be incorporated by the name of the master and brethren of the hospitall of the holy and individed Trinity of F. in the said county of C. And further, the said A. B. doth by these presents name and appoint the said D. E. E. F. F. G. &c. to be present brethren of the said hospitall, and the said D. E. to be present master of the said hospitall, and that by the name of the master and brethren, they shall have full power and authority, and lawfull capacity and ability to purchase, take, hold, receive and enjoy, and have to them, and their successors for ever, as well * goods and chattels, as mannors, lands, tenements, and hereditaments, being free-hold, of any person or persons whatsoever,

Vid. in le case de Suttons Hospitall, lib. 10. fol. 23. &c.

* Note these words.

A president of incorporation by force of this statute.

(and abbutell the same.)

* Nota, they may take, without any restraint, goods and chattels, as well real, personall and mixt, to what value soever.

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according to the forme and effects of the statutes in that case made and provided. And that the same hospitall, &c. and the persons so being incorporated, founded and named, shall have full power and lawfull authority by the said name of master and brethren, &c. to sue, and to be sued, implead and be impleaded, to answer and to be answered unto in all manner of courts and places within this realme, as well temporall as spirituall, in all manner of suits whatsoever, and of what nature and kind whatsoever such suits or actions be, or shall be. And the said A. B. doth by these presents assigne, name and appoint, that the said master and brethren, and their successors for ever hereafter shall have a common seale, with a crosse graven therein, and in the circumference thereof, *figillum hospitalis sanctæ Trinitatis de F.* whereby the said master and brethren, and their successors, shall or may seale any manner of instruments touching the same incorporation, and the lands, tenements and hereditaments, goods, or other things thereto belonging, or in any wise touching or concerning the same. And that it shall be lawfull for the said A. B. during his life, upon the death or removing of the said master, or any of the said brethren, to place one other in the roome of him that dyeth, or is removed. And after the death of the said A. B. it shall be lawfull for the parson of the said towne of F. and the church-wardens of the same for the time being, successively for ever after the decease of the said A. B. upon the death or removing of the master, or any of the brethren of the said hospitall, to place one other in the roome of him that dyed, or is removed, successively for ever. In witnesse whereof, &c.

22 E. 4. tit.
Grant 30. li. 10.
fol. 30. b. & 32.
a. in le case de
Suttons ho-
spitall.

And albeit that the onely essentiall point that the founder is to doe in this case is, to appoint and give a name to the corporation, yet by way of illustration we have thought it fit to adde so much as we have done, following the very words and effect of this act. And although that at the common law a corporation may be of an hospitall that is *in potestate* of certaine persons to be governours of the hospitall, and not of the persons placed therein, yet the safest and surest way upon this statute is, first to prepare the hospitall, and to place the poore therein, and to incorporate the persons therein placed. And this we hold by reason of the said words in this act, *viz.* And that such hospitall, &c. and the persons therein placed shall be incorporated, &c.

(10) *Such a common seale or seals, as by the founder or founders, &c. shall be assigned.*] It is necessary to be knowne, who shall be said to be founder or founders, for the better understanding of the clauses subsequent in this act.

Such onely are said to be founder or founders within this act, as are seised of an estate in fee-simple of any mannors, lands, tenements, or hereditaments, having the foure qualities aforesaid, and giveth the same at the first foundation of the hospitall, &c. to the incorporation of the hospitall. For it is a sure rule, that he or they that give the first possessions, is the founder or founders.

But then it is demanded, what if R. S. citizen of London, by his last will and testament do devise, that his executors shall bestow a thousand pounds in purchase of lands, tenements, or hereditaments, and that an hospitall shall thereupon be builded and incorporated for the sustentation and reliefe of poore and impotent people, and dyeth: the executors purchase lands, tenements and hereditaments of the yearly value of threescore pounds, having the said foure

33. aff. p. 22.
as judge lib. 3.
fol. 74. a. in le
case de dean &
chap. de Nor-
wich.

qualities.

qualities, and cause the estate to be taken to certaine persons and their heires, and build thereupon an hospitall, and place therein poore and impotent people: in this and the like cases the persons that have the estate in fee-simple in the lands, tenements, and hereditaments, are by the purview of this statute to be founders, and to doe all things that this act doth appoint the founder or founders to doe. But when they name the corporation, it shall be well and worthily done to name the corporation by the name of the master and brethren of the hospitall of the holy and undivided Trinity, founded in F. in the county of C. at the onely costs and charges of the said R. S. or the like; so as the charitable intention of the said R. S. may be had in remembrance, with some just recitall in the beginning of the deed of foundation of the truth of the case.

The next thing that is to be done after the incorporation, is to convey the lands, tenements and hereditaments to the said incorporation, which may be done safely, with greater facility and lesse charge, by bargain and sale by deed indented and inrolled (according to the statute of 27 H. 8. cap. 16.) between the founder or founders of the one part, and the master and brethren, &c. of the other part, in consideration of five shillings in hand paid by the master of the said hospitall (for himselfe and for his brethren) and of other five shillings in hand paid by the said master and brethren, &c. whereof you may have a president in the tenth booke of my reports in the case of Suttons hospitall, fol. 17. b. & 34. a. *respons al 9. objection*, which judgement is after allowed and ratified by act of parliament, *anno 4 regis Caroli*. And this bargain and sale to be a day or two, or some short time after the incorporation. But now let us returne to our act of parliament.

(11) *And further shall be ordered and visied, placed, or upon just cause displaced, &c.*] And forasmuch as nothing can prosper and continue, without good rule and government, the next thing to be done after the lands, &c. be conveyed unto them is, that the founder or founders shall set forth, make, devise and establish in writing under his or their hand and seale (for so it must be by force of this act) such rules, locall statutes and ordinances for the order, direction, visitation, placing, or upon just cause displacing of such master and brethren by such person or persons, bodies politick or corporate, their heirs, successors or assignes, as shall be nominated or assigned by the * founder or founders, the said rules, locall statutes and ordinances being not repugnant or contrary to the lawes and statutes of the realme. And these orders, &c. to containe (amongst many others) two especiall things, *viz.* daily prayer to Almighty God: and that the master and brethren be not idle, but that they and every of them exercise such worke meet for them, as the parson of the parish, and the church-wardens (or such other as the founder shall name) shall appoint or allow of, and to take a weekly account thereof. And these orders, &c. to beare date after the bargain and sale, and it is good to have them inrolled.

(12) *Provided also, and be it further enacted, that no such corporation to be founded by force of this act, shall at any time hereafter doe, or suffer to be done, &c.*] This clause of restraint in this act is as forcible, and rather more then the restraint by the statute of 13 Elis. cap. 10. And therefore hereby they are disabled as well to make any conveyance to the king, as to any subject, contrary to the true meaning of the act.

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27 H. 8. ca. 16.
See before the
exposition of
this statute.

Lib. 10. fol. 17.
& 34. in the case
of Suttons ho-
spitall.

* If the founder
limit not, who
shall visit? The
bishop of the dio-
cese. Vid. 2 H.
5. ca. 1. stat. 1.
Vid. 14 Elis.
cap. 5. El. cap.
18. 8 aff. p. 29.
31. But if the
founder or found-
ers limit who
shall visit, such
visitor or visitors
by force of this
act of parlia-
ment, shall stand
by the statute of
21 Jac. See the
statute of 13 El.
cap. 17.

Peruse well the statute in print in 13 Elis. cap. 17. for the erection and foundation of an hospitall by Robert earle of Leicester, which was the paterne whereby this act was framed. And see the orders and locall statutes made by him, for they were done by good advice, and have had good effect.

[726] The Statute of 21 Jac. Regis, Cap. 1. concerning Hospitalls, and Houses of Correction.

WHEREAS in the parliament held in the nine and thirtieth yeare of the reigne of the late queen Elisabeth of happy memory, a good law was made, entituled, An act for erecting of hospitalls, or abiding and working houses for the poore: but the power, licence and authoritie given by the said statute, to erect, found, and establish such houses and abiding places, as are therein mentioned, was confined to the space of twenty yeares then next ensuing, which said time is now expired.

Be it therefore enacted by the authoritie of this present parliament, that the said act, and all things therein contained, shall from henceforth be revived, and made perpetuall to have continuance for ever (1).

And be it also enacted, that all hospitalls, *measons de dieu*, and abiding places for poore, lame, maimed and impotent people, or for houses of correction, at any time since the said twenty yeares expired, erected (2), founded or made, or at any time hereafter to be erected, founded or made, according to the purport of the said statute, shall be incorporated, and have perpetuall succession and capacite, to have, take and enjoy all other priviledges, benefits, and immunities, to all intents and purposes, according to the provisions, tenour, purport and true meaning of the said act, as if the same had been made, founded, or endowed within the space of twenty yeares next ensuing the said statute, Stat. 43 El. 4.

(1) *That the said act, and all things therein contained, from henceforth be revived, and made perpetuall to have continuance for ever.*

These words [made perpetuall, and have continuance for ever] have made the said act of 39 Elis. and all things therein contained (at the making thereof but a probationer for 20 yeares long since expired) now by this act perpetuall, and to have continuance for ever.

(2) *That all hospitals, measons de dieu for the poore, &c. or for * houses of correction, at any time since the said twenty yeares expired, erected, &c.* Whereas some hospitalls, &c. or houses of correction were founded after the said twenty yeares expired, according to the

Nota, *hospitale* an hospitall, is the generall word, & includes *measons de dieu*, & abiding places for the poore, &c. also * houses of correction, as here it appeareth.

the said act, those by this act are incorporated, established and confirmed.

And likewise all hospitalls, &c. and houses of correction hereafter to be erected, &c. according to the purport of the said statute, shall be incorporated, &c. And note, that this branch makes the act of 39 Elis. &c. a perpetuall law.

Vid. 13 Elis. cap. 7. the moiety of the forfeiture of bankrupts given to the poore within hospitalls. 13 Elis. cap. 7.

31 Elis. cap. 6. If any which have election, nomination, voice, or assent thereunto of any person to have roome or place in any hospitall, shall have or take any money, reward or profit, directly or indirectly, or promise of money, reward or profit, that then such roome and place to be void, and another to be preferred to the place by those that have authority to elect, &c. 31 Elis. cap. 6. None that have election, &c. to take reward, &c.

In 43 Elis. a right profitable law was made, for commissioners to enquire of mis-employment of lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stockes of money given or appointed, some for reliefe of aged, impotent, and poore people, and some for reliefe of sicke and maimed souldiers and mariners, or for maintenance of houses of correction (*inter alia*) and by their orders to reforme the same, which act hath wrought very good effect in many cases.

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43 Elis. cap. 4.
A speedy remedy
in many cases.

An Exposition of the Statute of 7 Jac. Regis, [728] Cap. 4. concerning Houses of Correction, and the Government of them.

MANY statutes have been made for the punishment of rogues, vagabonds, and sturdy beggars, but very few to find them worke, and to enforce them thereunto. The principall of that kind is the statute of 39 Elis. ca. 4. which doth enact, that from time to time it shall and may be lawfull to and for the justices of peace of any county or city, assembled at any quarter sessions of the peace within the same county, city, borough, or towne corporate, to set downe order in three things: First, from time to time to erect, or cause to be erected one or more • houses of correction within their severall counties or cities. This first branch is a law perpetuall, and the justices of peace for the time being have power by this act from time to time to erect as many houses of correction, or work-houses, as they shall thinke convenient.

2. For the providing of stockes of money, and all other things necessary for the same. This also is a law perpetuall from time to time, &c.

3. For ruling and governing of the same.

4. For correction and punishment of ^a offenders thither to be committed. These two also are lawes perpetuall, *ut supra*.

5. For the better effecting whereof, they may make such orders

* Note, these are not only houses of correction, but work-houses also, as hereafter appeareth.

See 43 Elis. ca. 2. & 7 Jac. cap. 4. in the 2. branch.

^a Note the generality of this word.

The life of this
businessse consisteth
in framing
of these orders,
& in due execution
of the same.

as they shal from time to time thinke convenient, &c. and from time to time to reforme, take, and set down the same.

6. Which orders shall be of force (being warranted by authority of parliament) and be duly performed, and put in execution.

We passe over all the former lawes before this act of 39 Elis. for punishment of rogues, vagabonds, and sturdy beggars, many whereof were repealed by 1 E. 6. cap. 3. and all the rest are repealed by this act of 39 Elis. and will come to the abovesaid act of 7 Jac. This law consisteth upon a short preamble, and the body of the act, which is divided into nine branches.

The preamble.

Whereas heretofore divers good and necessarie lawes and statutes have been made and provided for the erection of houses of correction, for the suppressing and punishing of rogues, vagabonds, and other idle, vagrant, and disorderly persons, which lawes have not wrought so good effect as was expected, as well for that the said houses of correction have not been built according as was intended, as also for that the said statutes have not been duely and severely put in execution, as by the said statutes were appointed.

In this preamble are rehearsed two causes wherefore the former law and statute took not so good effect as was expected: First, for that houses of correction were not built according as was intended, wherein no deficiencie was in the law, but in the justices of peace, which should have ordered the same to be erected. For seeing education of youth, and setting of worke of idle and disorderly persons, are such essentiall parts of the well being of a commonwealth; and the onely meane to compell them to worke (as the law now standeth) is by houses of correction, seeing there hath been a default in the justices of the peace heretofore, and the mischief so daily increasing, we hope that the justices of peace, having yet power, will erect more houses of correction (which are also called work-houses) so as we shall have neither beggar (as the law of God commandeth) nor idle person in the common-wealth.

The second cause (which is the cause of causes) is, for that the statutes in that case made and provided were not put in execution, as by the said statutes was appointed.

And this excellent work is without question feasible: for upon the making of the statute of 39 Elis. and a good space after, whilest justices of peace and other officers were diligent and industrious, there was not a rogue to be seen in any part of England, but when justices * and other officers became *tepidi*, or *trepidi*, rogues, &c. swarmed againe.

See the third part
of the Institutes,
cap. Rogues.

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* 39 Elis. cap. 4.

The 1. branch.

For remedy whereof, be it enacted and established by our sovereign lord the kings majestie, and by the lords spirituall and temporall, and by the commons in this present parliament assembled, and by the authoritie of the same, that all lawes and statutes now in force, made for erecting and building of houses of correction, and for punishing of rogues, vagabonds, and other wandring and idle persons, shall be put in due execution.

The

The first branch of the body of this act consisteth on two parts: First, that all lawes and statutes made for erecting and building of houses of correction now in force should be put in due execution; which is so enacted, for the incitation and encouragement of justices of peace to do their duties in this so important a cause.

2. For punishing of rogues, vagabonds, and sturdy beggars (for those are the words of the former statute now in force) shall be likewise put in due execution. Execution is the end and life of the law. 39 Eliz. ubi sup.

And be it further enacted and established by the authority aforesaid, that before the feast of Saint Michael (1) the archangel, which shall be in the yeare of our Lord God one thousand sixe hundred and eleven, there shall be erected, built, or otherwise provided (2) within every countie of this realm of England and Wales, where there is not one house of correction already built, purchased, provided or continued, one or more fit and convenient house or houses of correction, with convenient backside thereunto adjoyning, together with mills, turns, cards (3), and such like necessarie implements, to set the said rogues, or such other idle persons on worke: the same houses to be built, erected or provided in some convenient place or towne in every county: which houses shall be purchased, conveyed, or assured (4) unto such person or persons, as by the justices of peace, or the more part of them, in their quarter sessions of the peace, to be holden within every countie of this realme of England and Wales, upon trust, to the intent the same shall be used and employed for the keeping, correcting, and setting to worke of the said rogues, vagabonds, or sturdy beggars, and other idle and disorderly persons (5). The 2. branch.

(1) *That before the feast of Saint Michael, &c.*] This clause was to hasten, and upon penalty to inforce justices of peace to so necessary and charitable a worke. * But this clause being in the affirmative, taketh not away the perpetuity of the act of 39 Eliz. for the erection of houses of correction and work-houses, from time to time, and at any time hereafter by justices of peace. * Nota.

(2) *Shall be erected, built, or otherwise provided.*] The statute of 39 El. used onely the word [erected,] but that included both the other words of this act, viz. [built and provided.] For if they caused a house already builded, to be provided or purchased, and converted the same to a house of correction, this is an erection of a house of correction within the statute of 39 Eliz. because as to the house of correction it was newly erected.

Erectio senatus erat nostris cohortationibus excitatus.

(3) *With convenient backside thereunto adjoyning, together with mills, turnes, cards, &c.* These particulars, and all other necessary things appertaining thereunto, are included within the generall words of 39 Eliz. viz. [for the providing of stockes, and all other things necessary for the same, &c.] which are generall and large words, and doe include all particulars necessary whatsoever.

(4) *Which houses shall be purchased, and conveyed, or assured, &c.*] This may be done by authority of this act, without licence or offence Cicero ad Brutum.

fence of any former law. And these may be incorporated by the statute of 39 Eliz. cap. 5. as in the exposition of that statute appeareth.

The house to be employed to three purposes: 1. for the keeping, 2. for the correcting, 3. for the setting to worke: so as it is not a house of correction alone, but of safe keeping, and setting on worke.

(5) *The said rogues, vagabonds, or sturdy beggars, and other idle and disorderly persons.*] The statute of 39 Eliz. by particular words did not extend to rogues, vagabonds, and sturdy beggars, but in generall words, for the punishment of offenders thereunto committed. Which generall words are both by the first branch of this act explained to be wandering or idle persons: and many other branches of this act, to idle or disorderly persons, and specially by the branch, whereby the authority of the justices to commit to the house of correction is warranted. All idle or disorderly persons may be committed by them to the house of correction and work-house.

And where all the judges of England did for the good of the common-wealth, and the better instruction and direction of justices of peace, and for the due execution of the said act of 39 Eliz. amongst other things resolve, that such persons as be of any parish, and have able bodies to worke, and be no wanderers abroad out of the parish, though they refuse to worke at such wages as is taxed (or commonly given) in those parts, are notwithstanding not to be sent to their place of birth, or last dwelling, by the space of a yeare, but to the house of correction, upon consideration had of both the statutes of the poor and rogues. But if they that have any lawfull meanes to live by, though they be of able bodies, and refuse to worke, yet are they not to be sent to the house of correction.

But by this statute of 7 Jac. enacted long after the resolution of the judges, though they have lawfull meanes to live by, yet if they be idle or disorderly persons, the justices of peace have power to commit them to the house of correction, a generall and large power given to them, without exception of any person. And their mittimus to the house of correction may be more safely upon this statute, *quia otioso et inordinata persona*: for that he is an * idle and disorderly person, or that he is an idle person, or that he is a disorderly person, according to the words of this act, then upon the statute of 39 Eliz.

* The words in the 5. branch are in the disjunctive.

The 3. branch.

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And be it further enacted by the authoritie aforesaid, that if the said house to be erected, purchased, or provided, shall not be erected, built, or otherwise provided, before the feast of S. Michael the archangel, which shall be in the yeare, one thousand sixe hundred and eleven, next ensuing the last day of this present session of parliament, that then every justice of peace within every countie of this realme of England and Wales, where such house and backside shall not be erected or provided, shall forfeit for his said neglect five pounds of lawfull English money, the one moiety thereof to be unto him or them that will sue for the same by action of debt, bill, plaint, or information: in which suit, no protection, essoine, or wager of law shall be admitted: and the other moiety thereof to be employed and bestowed

stowed towards the erecting, building, procuring or providing the said house and backside, and such necessary implements, as aforesaid.

The penalty of five pounds of every justice of peace, if the house of correction be not provided within the time of this act of 7 Jac. And how the same penalty shall be recovered and employed.

And be it further enacted and established by the authoritie The 4. branch. aforesaid, that the justices of peace of every countie within the realme of England and Wales, at their quarter sessions of the peace, to be holden for their severall counties (next after the erecting, providing or building of the said house or houses, and so from time to time) or the most part of them shall elect, nominate and appoint, at their will and pleasure, one or more honest fit person or persons, to be governour or master of the said house or houses so to be purchased, erected, built or provided: which person and persons so chosen by vertue of this present act, shall have power and authoritie, to set such rogues, vagabonds, idle and disorderly persons, as shall be brought or sent unto the said house to worke and labour (being able) from time to time, for such time, as they shall continue and be remaining in the said house of correction, and to punish the said rogues, vagabonds, idle and disorderly persons, by putting fetters or gives upon them, and by moderate whipping of them, and that the said rogues, vagabonds, and idle persons, during such time as they shall continue and remaine in the said house of correction, shall in no sort bee chargeable to the countrie for any allowance, either at their bringing in, or going forth, or during the time of their abode there, but shall have such and so much allowance, as they shall deserve by their owne labour and work.

By this branch it is enacted, that the justices of peace, &c. shall elect, &c. one or more fit person or persons, to be governour or master of the said house or houses.

Herein also are added idle and disorderly persons, and power given to the governour or master to punish them, by putting fetters or gives upon them, and by moderate whipping of them.

These idle and disorderly persons shall be in no sort chargeable to the countrie, &c. but shall have such allowance as they shall deserve by their owne labour and worke. Nota.

And be it further enacted by the authoritie aforesaid, that the said justices of peace of every countie within every of their severall divisions, twice in every yeare at the least, and oftner, if there be occasion, shall assemble and meet together for the better execution of this statute, and that some foure or five daies before their assembly and meeting, the said justices or the more part of them, shall by their warrant command the constables and tithingmen The 5. branch.

tithingmen of every hundred, towne, parish, village, and hamlet within their said severall divisions, which shall be assisted with sufficient men of the same places, to make a generall privie search in one night within their said hundreds, townes, villages, and hamlets, for the finding out and apprehending of the said rogues, vagabonds, wandring and idle persons, and that such rogues, vagabonds, wandring and idle persons, as they shall then find and apprehend in the said search, shall by them be brought before the said justices, at their said assembly or meeting, there to be examined of their idle and wandring life, there to be punished, or otherwise by their warrant to be sent or conveyed unto the said house or houses of correction within the said countie, appointed and prefixed, there to be delivered unto the master or governour of the said house, or to his deputie or assignee, to be set to labour and worke; at which daies and times of assembly or meeting, so to be held by the said justices of peace, the constables and tythingmen of every hundred, parish, towne, village and hamlet, shall then appear in every their severall divisions, before the said justices of peace, at the said assemblies or meetings, and there shall give account and reckoning, upon oath in writing, and under the hand of the minister of every parish, what rogues, vagabonds, and wandring and disorderly persons they have apprehended both in the same search, and also between every such assemblies and meetings, and how many have been by them punished, or otherwise sent unto the houses of correction: which if the said constables or tythingmen shall neglect to performe, as also to convey safely all such rogues, with all other idle or disorderly persons at the charge of the hundred, as by the justices of peace warrants shall be sent unto the houses of correction in the same county, that then they shall forfeit such further fines, paines, and penalties, as by the said justices of peace, or the most part of them, shall be thought fit and convenient, not exceeding the summe of forty shillings for every offence.

The justices of peace within their severall divisions, twice every yeare at the least, and oftener, if there be occasion, shall assemble and meet together, &c.

Generall and privie search shall be made in every hundred, towne, &c.

The constables account of idle or disorderly person, &c. apprehended.

Note this.

In this branch these words are specially to be observed, viz. With all other idle or disorderly persons, at the charge of the hundred, as by the justices of peace warrants shall be sent to the houses of correction.

The 6. branch.

And for that it is convenient, that the masters or governours of the said houses of correction should have some fit allowance and maintenance for their travell and care to be had in the said service,

service, as also for the relieving of such as shall happen to be weake and sicke in their custodie, and that the subjects of this realme should in no sort be overcharged, to raise up money for stockes to set such on worke as shall be committed to their custody: be it therefore enacted and established by the authoritie of this present parliament, that the masters or governours of the said houses of correction, shall have such summe of money yearly, as shall be thought meet, by the most part of the justices of peace within the said countie, at the quarter sessions of the peace, the same to be paid quarterly before-hand by the treasurers, appointed by one act made in the three and fortieth yeare of the late queene Elisabeth, intituled, An Act for the reliefe of the poore, during the time they the said masters or governours shall be employed in the said service (the said master or governour giving sufficient securitie, for the continuance and performance of the said service) which if the said treasurer shall neglect or refuse to performe, that then the said master or governour of the house of correction, shall have authoritie by this present act, to levie the same, or so much thereof as shall be unpaid, upon the said treasurers account, in such manner and forme as by the said statute they the said treasurers are appointed and authorized to levie the weekly summe or payment, being to them unpaid.

[733]

This branch provideth for fit allowance and maintenance to be made to the masters or governours of the said houses, &c. *Dignus operarius mercede.*

Treasurers appointed by one act made *anno* 43 Elif. cap. 2. intituled. For the reliefe of the poor (and falsely intituled in the last printed book of statutes, Who shall be overseers for the poore, their office, duty and account) which act of 43 Elif. by the right title, being but a probationer, hath been, and yet is continued, as it appeareth by the statute of 4 Car. *regis*, cap. 4.

See 1 Jac. cap. 25. an addition thereunto.

a Jac. c. 25.
21 Jac. cap. 25.
The 7. branch.

And because great charge ariseth upon many places within this realme, by reason of bastardy, besides the great dishonour of Almighty God, be it therefore enacted by the authoritie aforesaid, that every lewd woman, which after this present session of parliament, shall have any bastard, which may be chargeable to the parish, the justices of peace shall commit such lewd woman unto the house of correction, there to be punished, and set on worke during the terme of one whole yeare: and if she shall eschoones offend againe, that then to be committed to the said house of correction as aforesaid, and there to remaine untill she can put in good sureties for her good behaviour, not to offend so againe.

The punishment of lewd women having bastards, &c. That every lewd woman, which shall have any bastard, which may be chargeable to the parish, the justices of peace may commit her to
SERIES - 3.
and continued
to this day,
the 3 Jac. c. 4.

the house of correction, &c. So as if she will discharge the parish of the keeping of the bastard, she cannot be punished by this statute, but by that of 18 Elis. cap. 3.

The 8. branch.

And for that many wilfull people, finding that they having children, have some hope to have reliefe from the parish wherein they dwell, and being able to labour, and thereby to relieve themselves and their families, doe nevertheless run away out of their parishes, and leave their families upon the parish: for remedy whereof, be it further enacted by this present parliament, and the authoritie of the same, that all such persons so running away, shall be taken and deemed to be incorrigible rogues, and endure the pains of incorrigible rogues: and if either such man or woman being able to work, and shall threaten to run away, and leave their families as aforesaid, the same being proved by two sufficient witnesses upon oath before two justices of peace in that division, that then the said person so threatening, shall by the said justices of peace be sent to the houses of correction, (unlesse he or she can put in sufficient sureties for the discharge of the parish) there to be dealt with and detained as a sturdy and wandring rogue, and to be delivered at the said assembly or meeting, or at the quarter sessions, and not otherwise.

[734]

This branch consisteth upon two parts: first, if any man or woman having children, being able to labour, and thereby to relieve their families doe run away out of the parishes, and leave their families upon the parish, he or she is taken and deemed by authority of this parliament an incorrigible rogue.

2. If any such man or woman, being able to work, shall threaten to run away, and leave their families as aforesaid, the same being proved by two sufficient witnesses before two justices of peace in that division, the same person so threatening, &c. shall be sent to the house of correction, as a sturdy and wandring rogue, &c. unlesse sufficient surety be found for the discharge of the parish.

The 9. branch.

And because there shall be the more care taken by all such masters of the houses of correction, that when the country hath been at trouble and charge, to bring all such disorderly persons as aforesaid to their safe keeping, that then they shall performe their duties in that behalfe, be it therefore enacted by the authoritie aforesaid, that if they shall not every quarter sessions yeeld a true and lawfull account unto the justices of peace, of all such persons as have been committed to their custody: or if the said persons committed to their custody, or any of them, shall be troublesome unto the country, by going abroad, or otherwise, shall escape away from the said house of correction, before they shall be from thence lawfully delivered, that then the said justices shall set downe such fines and penalties upon the said master or governours, as the most part of them in their quarter sessions shall thinke fit and convenient, and all fines
and

and penalties not herein before limited, shall be paid unto the treasurer, and accounted for by the treasurer aforesaid: this act to have continuance for the space of seven yeares, and from thence to the end of the next session of parliament after the said seven yeares. 3 Car. 4. continued untill the end of the first session of the next parliament.

The masters of the houses of correction shall yeeld a true and lawfull account at every quarter sessions of all such disorderly persons as have been committed to their custody.

This act was but a probationer for a certaine time, but it hath been continued: and lastly, by the said statute of 4 Car. cap. 4.

Thus much have we written for the better and more speedy execution of these excellent statutes: and the rather, for that few or none are committed to the common gaole amongst so many malefactors, but they come out worse then they went in. And few are committed to the house of correction, or working house, but they come out better.

And where some are of opinion, that in particular townes a discreet and expert workman may set the young and idle people as voluntaries on worke: certainly, the youth on both sexes hath (in the time of this great negligence) gotten such a * trade of picking theevery, stealing of wood, and the like, through idlenesse, as they will be never brought to worke, unlesse they be thereunto compelled (and the rather, for that some of their parents and masters have benefit by them) but compelled they may be, and this great worke happily effected, if by the order of the justices of peace these statutes be put in due execution. See the statute of 43 Elis. cap. 2.

We have not gone about to speake of the statute of 39 Elis. or other statutes concerning rogues, &c. or the poore, &c. which all the judges of England have upon due consideration explained, and which are truly rehearsed and imprinted, and ought to be observed, other then such as later acts of parliament have altered, whereof somewhat hath been said.

* Morem fecerat
usus, Ovid.
Ars sit quæ à
teneris primum
conjungitur an-
nis, Ovid.

[735]

Lamb. Justice
of Peace, lib. 2.
page 207.

An Exposition upon the Statute of 31 Elis. [736] Cap. 7. Concerning Cottages and Inmates.

FOR the avoiding of the great inconveniences which are found by experience to grow by the erecting and building of great numbers and multitude of cottages (1), which are daily more and more increased in many parts of this realme: be it enacted by the queenes most excellent majesty, and the lords spirituall and temporall, and the commons in this present parliament assembled, and by the authority of the same, that after the end of this session of parliament, no person (2) shall within this realme of England, make, build, or erect, or cause

The 1. branch.

to be made, builded, or erected any manner of cottage for habitation or dwelling, nor convert or ordaine any building or housing, made, or hereafter to be made, to be used as a cottage for habitation or dwelling, unlesse the same person doe assigne and lay to the same cottage or building foure acres of ground at the least, to be accounted according to the statute or ordinance *de terris mensurandis*, being his or her owne free-hold and inheritance, lying neere to the said cottage, to be continually occupied and manured therewith, so long as the same cottage shall be inhabited, upon paine that every such offender shall forfeit to our soveraigne lady the queenes majesty, her heires and successors, ten pounds of lawfull mony of England, for every such offence.

r. put Vet. Mag.
Chart. 128.

(1) *Cottage.*] Is derived from the Saxon word *cote*, unde *coterelli* for cottagers, and *cottagium* for a cottage. Vide the first part of the Institutes, sect. 1. fol. 5. out of Domesday. And the statute entitled, *Extenta manerii*, anno 4 E. 1. Item *inquirendum est de coterellis*, viz. *qui cottagia et curtillagia teneant*. And this signification it had by the common law.

(2) *No person, &c.*] This extends as well to persons politicke and incorporate, as to naturall persons whatsoever.

If an ancient
cottage had been
wholly decayed
before this act,
it is not lawfull
newly to erect
the same after
the end of our
act.

This first branch prohibiteth foure things: first, the new erecting or building of any cottage after the end of this parliament, which was 29 Martii, anno 31 Elif. anno Dom. 1589.

2. It prohibiteth the conversion or ordaining of any housing or building, made, or hereafter to be made, to be used as a cottage.

3. Albeit the house or building were made before this act, yet if the conversion were after the 29 day of March 1589, it is prohibited by this statute; for in point of conversion the words be (made, or hereafter to be made.)

4. These things are prohibited in this branch, upon paine of forfeiture of ten pounds to the king for every such offence.

The 2. branch.

And be it further enacted by the authority aforesaid, that every person, which after the end of this session of parliament, shall willingly uphold, maintaine, and continue any such cottage hereafter to be erected, converted, or ordained for habitation or dwelling, whereunto four acres of ground, as is aforesaid, shall not be assigned and laid to be used and occupied with the same, shall forfeit to our said soveraigne lady the queenes majesty, her heires and successors, forty shillings for every moneth that any such cottage shall be by him or them upholden, maintained, and continued.

[737]

Nota, this word
[*such*] referreth
to the cottages
described to be
erected or con-
verted after the
end of our par-
liament.

This branch inflicteth punishment upon such as shall willingly uphold, maintaine, and continue any * such cottage after the end of this parliament, either erected, or converted, or ordained, as is aforesaid, for habitation, &c. upon the penalty of forty shillings to the king for every moneth that any such cottage shall be maintained.

So as a cottage is two fold, either newly erected, or builded after
our

our statute, or of a house built before or after our statute, and converted after our statute to a cottage.

But out of these two branches are five exceptions.

By the first branch of this act any person may either erect a new cottage, or convert an old or a new house to a cottage, if he lay to it foure acres of ground at the least, which must have these foure incidents: first, these acres must be accounted according to the statute or ordinance *de admesuratione terræ*, anno 35 E. 1. which is after sixteen foot and an halfe to the pole. 2. These foure acres must be his or her freehold and inheritance (for neither grounds holden by copy, or for life or lives, or for any number of yeares will serve) and it must be freehold either in fee-simple, or fee-taile. 3. They must lye neere the said cottage. 4. They must be continually occupied therewith, so long as the cottage shall be inhabited.

The 1. exception.

This statute is named in our act, the statute or ordinance *de terris admesurandis*.
Vid. 35 El. c. 6.

This act extends not to cottages erected, or houses converted to cottages before the 29 day of March 1589. The second branch maketh this cleare.

The 2. exception.

This act shall not extend to any cottage, which shall be ordained (that is, converted) or erected to or for habitation or dwelling in any citie, towne corporate, ancient borough, or market towne.

The 3. exception.

Nor to any cottages or buildings erected or converted for the necessary habitation of any labourers in any minerall workes, collieries, quarries, or delfes of stone or slate, or about making of brick, tile, lime, or coles; so as the same cottages or buildings be not above one mile distant from the minerall, or other workes.

The 4. exception.

Nor to any cottage to be made in three places, *viz.* 1. within a mile of the sea, 2. upon the side of such part of a navigable river, where the * admirall ought to have jurisdiction, so long as a sailer shall dwell therein, or some person of manuell occupation, for the making, furnishing, or victualling of any ship, &c. 3. In any forreist, chase, warren, or parke, so long as the under keeper or warrener dwell therein, &c.

The 5. exception.

* See for this the fourth part of the Institutes, ca. of the court of the admiralty.

4. Nor to any cottage * heretofore made, 1. for a common herdsman, 2. for a common shepherd, &c. (of whom his cottage is called a sheepecote) so long as a common herdsman or shepherd shall therein dwell, 3. for a poore, lame, sick, aged, or impotent person.

* This fourth part needed not: for the body of the act extended to cottages hereafter; but *abundans cautela non nocet*.

Note, this exception extendeth onely to cottages erected or made before this act, by reason of these words [heretofore made] but none of these three can be erected after this statute, for any of these three purposes, unless there be laid to it foure acres of ground with the foure incidents abovesaid. Lambert Justice of Peace, pag. 476. mistaketh this part, and for heretofore, saith hereafter. But by the statute of 43 Elis. cap. 2. either the church-wardens and overseers, or the greatest part of them, by the leave of the lord of the waste, &c. in writing, under the hand and seale of the lord, or by order of the justices of peace at their generall quarter sessions, by the leave of the lord, as is aforesaid, may erect convenient houses of habitation for poore impotent people, and also to place inmates, or more families then one in one cottage or house. First, note that this extendeth only to such as be poore and impotent. 2. It extendeth not to any common herdsman or shepherd, as hath been likewise mistaken.

Nor doth our act extend to any cottage to be made and decreed upon complaint made to justices of assise, or justices of peace in

open assises, or quarter sessions of the peace to continue for habitation during the time only of such decrec. This last branch extendeth only to cottages made after our statute.

The 3. branch.

Provided also, and be it enacted, that from and after the feast of All Saints next coming, there shall not be any inmate, or more families or households then one, dwelling or inhabiting in any one cottage (1), made, or to be made or erected, upon paine that every owner or occupier of any such cottage, placing, or willingly suffering any such inmate, or other family then one, shall forfeit and lose to the lord of the leet, within which such cottage shall be, the summe of ten shillings of lawfull money of England, for every moneth that any such inmate, or other family then one, shall dwell or inhabit in any one cottage, as aforesaid. And that all and every lord and lords of leet and leets, and their stewards within the precinct of his and their leet and leets, shall have full power and authority within their severall leets, to enquire, and to take presentment by the oath of jurors of all and every offence and offences in this behalfe, and upon such presentment had or made to levie by distresse to the use of the lord of the leet, all such summes of money as so shall be forfeited: and moreover, that it shall be lawfull for the lord of every such leet where such presentment shall be made, to recover to his own use any such forfeiture, by action of debt in any of the queenes majesties courts of record, where-in no essoine, protection, or wager of law shall be allowed.

(1) *There shall not be any inmate or more families or households then one dwelling or inhabiting in any one cottage, &c.*] Inmate. In the statute of 35 Elif. cap. 6. it is said inmate, or under sitter. It is here well explained by these words (or more families in any one cottage.)

Here seven things are to be observed:

1. That no inmate or under-sitter can be within this statute, but in a cottage.

2. This branch concerning inmates extendeth to cottages as well made before this statute, as after.

3. And as well to * cottages having foure acres of ground or more laid to them as is aforesaid, as others that have no ground at all.

4. Upon paine that every owner or occupier of any such cottage, placing, or willingly suffering any such inmate, or other family then one, shall forfeit and lose to the lord of the leet, within which such cottage shall be, the summe of ten shillings for every moneth, &c. This moneth is to be accounted according to the computation of 28 daies.

5. And upon such presentment had or made, to levie by distresse, &c. that is, to sell the distresse which he shall take within the precinct of the leet for such forfeiture; and if there be a surplussage over the value of the forfeiture, to deliver it to the owner.

6. This act extendeth as well to inmates in cottages in any city, towne corporate, ancient borough, or market town, as in any other cottage wheresoever. *Vide Hill. 8 Jacobi in communi banco, Rot. 2193.* between John Pafe plaintife, and Robert Peat defendant in trespassse,

See the statute of 43 Elif. ca. 2. ut sup. concerning inmates.

Inquilinus (derived of *in* & *colo*, to dwell within) is the proper word for an inmate, or under-sitter.

* Coke lib. Int. 165. b.

3 H. 7. 4.

trespasse, Salop, A justification upon this statute for the penalty for keeping an inmate.

7. Hereby the act giveth election to the lord to take his remedy by action of debt in any of the kings courts of record.

Be it further enacted by the authoritie aforesaid, that all justices of assises, and justices of peace in their open sessions, and every lord within the precinct of his leet, and none others, shall have full power and authority within their several limits and jurisdictions, to enquire of, heare and determine all offences contrary to this present act, as well by indictment, as otherwise by presentment or information, and to award execution for the levying of the severall forfeitures aforesaid, by *feri facias*, *elegit*, *capias*, or otherwise, as the cause shall require.

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The 4. branch

In this branch these foure things are to be observed :

1. That these 3. *viz.* justices of assises, justices of peace, and lords of leets and no other judges or justices can enquire, &c. any of the offences against this statute. And therefore the sheriffe in his turn cannot enquire, &c. of any offence against this statute committed within the leet of any lord thereof.

2. That they may enquire, heare, and determine all offences, &c. so as there is a concurrent power in every of these three, and the judgement, &c. of such one of them, as doe first enquire, heare, and determine the same, shall stand ; and each of them may enquire of all and every of the offences against this act.

3. As well by inditement, or otherwise by presentment or information. The difference between an inditement and presentment is this, that the inditement is drawne and ingrossed in parchment in forme of law, and delivered to the jurors to be enquired of, &c. And a presentment is properly that which the jurors find and present to the court, without any former inditement delivered to them, which afterward is reduced to a formed inditement. Every inditement which is found by the jurors is presented by them to the court : for the record saith, *juratores presentant*, &c. when they find an inditement. And therefore every inditement is a presentment, but every presentment is not an inditement.

Offences found in leets, court barons, &c. are commonly called presentments ; which was the reason that this act giving jurisdiction to a leet, doth use this word (presentment) in this and the third branch.

4. To award execution by * *feri facias*, *elegit*, *capias*, or otherwise : hereby is greater jurisdiction given to the leet, then it had at the common law ; so as the lord of the leet hath by the third branch power to levie the forfeiture due to him by distresse, or by action of debt by the common law ; and by this fourth branch, by *feri facias*, *elegit*, or *capias*.

Co. li. lxxi.
605, 606.

Provided alwaies, that this statute, or any thing therein contained, shall not in any wise be extended to any cottage, which shall be ordained or erected to, or for habitation or dwelling in any city, towne corporate, or ancient borough, or market towne within this realme, nor to any cottages or buildings, which shall be erected, ordained, or converted to, and for the necessary and convenient habitation or dwelling of any workmen, or labourers

in any minerall workes, cole mines, quarries, or delfes of stone, or slate, or in or about the making of brick, tile, lime, or coles within this realme; so as the same cottages or buildings be not above one mile distant from the place of the same minerall or other workes, and shall be used onely for the habitation and dwelling of the said workmen, nor shall in any sort prejudice, charge, or impeach any person or persons, for the erecting, maintaining, or continuing of any such cottages, as are before in this proviso mentioned and specified.

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Provided alwaies, that this act shall not extend to any cottage to be made within a mile of the sea, or upon the side of such part of any navigable river, where the admirall ought to have jurisdiction, so long as no other person shall therein inhabit; but a failer, or man of manuell occupation, to or for making, furnishing, or victualling of any ship or vessell, used to serve on the sea; nor to any cottage to be made in any forrest, chase, warren, or parke, so long as no other person shall therein inhabit, but an under-keeper or warrener, for the good keeping of the deere, or other game of warren, nor to any cottage heretofore made, so long as no other person shall therein inhabit, but a common herdman or shepherd, for keeping the cattell or sheep of the towne; or a poore lame, sick, aged, or impotent person, nor to any cottage to be made, which for any just respect upon complaint to the justice of assise at the assises, or to the justices of peace at the quarter sessions, shall by their order entered in open assises or quarter sessions, be decreed to continue for habitation, for and during so long time onely, as by such decree shall be tolerated and limited. Stat. 35 Elif. 6. 43 Elif. 2.

Of these proviso's sufficient hath been spoken before in the second branch of this statute.

The inconveniences that grow by unlawfull cottages, and inmates in cottages against this statute, as appeare by the preamble, are great, being nests to hatch idleness, the mother of pickings, theeveries, stealing of wood, &c. tending also to the prejudice of lawfull commoners; for that new erected cottages within the memory of man, though they have foure acres of ground, or more laid to them, according to this act, ought not to common in the wastes of the lord; but the greatest inconvenience of all is, the ill breeding and educating of youth, which inconveniences may be easily helped and remedied by the provisions of this excellent law, if lords of leets and their stewards would looke to the execution of this act, which we hold the readiest meanes: for albeit the cottage erected, or converted, cannot by any provision in this statute be demolished, or pulled downe; yet the execution of the penalty of this act will make it inhabitable, and work the desired effect. And they may also be amerced for wrongfull commoning in the court baron.

*Casa à casu (id est) ruina, quia ruinæ est obnoxia.
Domuncula, tugurium à tegendo.*

Virg. 2. Elog.

Pauperis et tuguri congestum cespite culmen.

A Col.

A Collection and Exposition upon the Statutes of Employments, viz. 14 R. 2. cap. 1. and 2. 2 H. 4. cap. 5. 4 H. 4. cap. 15. 5 H. 4. cap. 9. 6 H. 4. cap. 4. 11 H. 4. cap. 8. 9 H. 5. cap. 9. Stat. 2. 8 H. 6. cap. 24. 27 H. 6. cap. 3. 17 E. 4. cap. 1. 1 H. 7. cap. 2. 3 H. 7. cap. 8.

With their severall Alterations and Repeales, and Expirations of some of them; our principall Aime ever being to set down how the Law standeth at this Day.

BEFORE the making of any of these statutes, we find that merchant-strangers found sureties that they should not carry out the merchandizes which they brought in.

It was ever the policie of this realme to entertaine merchant-strangers fairly and free'y, having respect how our merchants were demeaned abroad.

In the 18 yeare of E. 1. in the parliament roll it is contained thus: *Cives London petunt quod alienigenæ mercatores expellantur à civitate, quia ditantur ad depauperationem civium, &c.*

Responsio. Rex intendit quod mercatores extranei sunt idonei et utiles magnatibus, &c. et non habet consilium eos expellendi.

There be two kinds of statutes concerning employments, the one where merchandizes, &c. are brought in, the other upon exchange. And first of the first.

The statutes of 14 R. 2. cap. 1. and 2 H. 4. cap. 5. are altered by the statute of 4 H. 4. cap. 15. And therefore we will begin with it.

It is ordained and established that all merchant * aliens, strangers, and denizens (1), which bring merchandizes into the realme of England, and the same do sell within the realme, and receive English money (2) for the same, shall bestow the same money upon other merchandizes of England, without carrying of any gold or silver, in coine, plate or masse out of the saide realme, upon paine of forfeiture of the same, saving alwaies their reasonable costs.

the two former extended but to the halfe. 27 H. 6. cap. 3. farther provision was added, but that statute is expired. This act is confirmed by the statute of 5 H. 4. cap. 9. vid. 17 E. 4. cap. 1. and 3 H. 7. cap. 8.

Rot. Vascor.
18 E. 2. m. 21.

See Mag. Charta
c. 30. 5 H. 4.
c. 7.

Rot. Parliament.
18 E. 1. fol. 4.
nu. 55.

* The Parliament Roll hath aliens, which of late hath beene omitted. Vid. 17 E. 4. cap. 1. This act extendeth to the whole merchandizes, and to the whole money, whereas

There were two notable causes of the making of this act, as it is declared by the statute of 5 H. 4. ca. 9. viz. First, for the better keeping of gold and silver within this realme. Secondly, for the increase of the commodities of the same.

* The former two statutes extended to strangers onely.

Nota, the original is merchant-aliens; strangers and denizens, which doth

cleare it. See the first part of the Institutes, f. 198. f. 129. for this word *denizen* † So resolved 7 Eliz. by the Barons.

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This act of 17 E. 4. is confirmed by 3 H. 7. cap. 8.

* Nota, [leige people,] so as he cannot pay it to a stranger, or he that is made *denizen*, for leige is as much as subject borne. † 1 H. 7. cap. 2. 11 H. 7. cap. 14.

8 H. 6. cap. 24.

See a case upon this Stat. in an information, &c. 10 H. 7. a. b. 9 H. 6. cap. 2.

But the statute of 17 E. 4. cap. 1. extends not to strangers which are made denizens: and therefore such as are so made denizens, are out of the penalty of that statute, but within the penalty of this of 4 Hen. 4. And that act of 17 E. 4. hath altered this act in another point, viz. that either hee may employ the money upon the merchandizes, whereunto 4 H. 4. only extended or other commodities of the realme, or hee may put the same in payment to the kings * liege people within this realme.

Such as are made denizens † by letters patents, or by parliament, or otherwise, shall pay for his merchandize like custome and subsidie, as they ought or should pay afore they were made denizens. See 11 H. 7. cap. 14. and 22 H. 8. cap. 8. See the statute of 1. Eliz. cap. 11.

(2) *English money.*] This is intended of all money of gold or silver currant within the realme of England, although it bee not coined within England. By this act he might have received English money either in silver or gold, but by the statute of 8 H. 6. cap. 24. he cannot receive any gold, nor ought to refuse the payment in silver.

By the said act of 8 H. 6. no Englishman should sell within this realme, &c. to any merchant alien, &c. any manner of merchandizes but onely for ready payment in hand, or else in merchandizes for merchandizes, to be paid and contented in hand, upon pain of forfeiture of the same; but by the statute of 9 H. 6. ca. 2. at the next parliament libertie was given for clothes onely from six moneths to six moneths next ensuing after such buyings made, without giving any further day of payment, upon paine of forfeiture of the same. This ordinance to endure as long as it shall please the king (3), but for all other merchandizes the statute of 8 H. 6. standeth in force.

(3) *As long as it shall please the king.*] This statute standeth untill the king or some of his successors (for successors are included under the name of king) shall adnull or make the same voide by proclamation under the great seale, which is the meane to make this act voide, and all others of like nature. Like acts are in 6 Hen. 6. cap. 1. 8 Hen. 6. cap. 8. 18 Hen. 6. cap. 13. 5 Ed. 6. cap. 7. &c.

The said act of 4 H. 4. cap. 15. prescribed no time for the employing of the money, but the statute of 5 H. 4. cap. 9. doth bind them to employment within a quarter of a year after their comming into

10 H. 7. 7. b. Sir William Cabels case.

5 E. 6. cap. 7.

into this realme: but at the next parliament holden the next
 yeare, that branch onely for the limitation to a quarter of the
 yeare is made void and annulled: but the two other branches,
 viz. for the taking of * sureties by customers and controllers in
 all the parts of England for due employment; and concerning
 money taken by exchange in this realme (whereof more shall be
 said hereafter) are not repealed by 6 H. 4.

6 H. 4. cap. 4.

* A necessary
 branch to be put
 in execution.

See the resolution of the barons of the exchequer *anno* 7 Eliz.
 and entered in the custome-house concerning the statutes of employ-
 ments.

The justices of peace have power to heare and determine, all
 defaults and forfeitures purviewed or inflicted by the statute of
 17 E. 4. cap. 1.

The other kind of statutes concerning employments upon ex-
 change.

The second part.

That for every exchange that shall bee made by merchants
 to the court of Rome, or elsewhere (beyond the seas) that the
 said merchants bee firmly and surely bound in the chancery, to
 buy within three moneths after the exchange made merchan-
 dizes of the staple, as wooll, leather, woollfells, leade or tinne,
 butter or cheefe, clothes or other commodities of the land, to
 the value of the sum so exchanged, upon paine of forfeiture of
 the same.

14 R. 2. cap. 2.
 It was altered by
 the statute of
 9 H. 5. cap. 9.
 stat. 2. but that
 statute is expir-
 ed, and 14 R. 2.
 standeth in force.

This statute extendeth to exchanges made by any merchant
 alien, denizen, or borne subject to foreine parts.

And also that the money delivered by exchange in England be
 employed upon the commodities of this realme within the same
 realme, upon pain of forfeiture of the same money.

[743]
 5 H. 4. cap. 9.

This act extendeth to money delivered by way of exchange
 within the realme; and this branch is not repealed by the statute
 of 6 H. 4. cap. 4.

Anno 23 H. 8. a proclamation was made for observation of the
 statutes of employments.

Holl. Chron. an.
 23 H. 8. pag.
 297.

An usuall thing when necessary statutes have beene (most com-
 monly for private ends) for a time discontinued, to give all men
 notice thereof by proclamation, that such statutes for the time to
 come should bee put in due execution.

This have wee done upon consideration of all the said severall
 statutes for advancement of trade and traffick, especially of our
 native commodities, the life of every kingdome, and principally of
 isles,

The Statute of 25 Hen. 8. cap. 15. Concerning
Printers, and Binders of Bookes.

BE it enacted, &c. that no person or persons resiant or inhabitant within this realme, &c. shall buy to sell againe any printed bookes, brought from any parts out of the kings obedience ready bound in boords, leather, or parchment, upon paine to lose and forfeit for every book bound out of the kings obedience, and brought into this realme, and bought by any person or persons within the same to sell againe contrary to this act, six shillings eight pence.

And be it further enacted by the authority aforesaid, that no person or persons inhabitant or resiant within this realme, &c. shall buy within this realm, of any stranger born out of the kings obedience, other then of denizens, any manner of printed books brought from any the parties beyond the sea, except only by engrosse, and not by retaile: upon pain of forfeiture of 6 s. 8d. for every book so bought by retaile, contrary to the form and effect of this estatute, the said forfeitures to be alwaies levied of the buyers of any such bookes, contrary to this act: The one halfe of all the said forfeitures to be to the use of our soveraigne lord the king, and the other moitie to be to the party that will seise or sue for the same in any of the kings courts, be it by bill plaint, or information, wherein the defendant shall not be admitted to wage his law, nor no protection, ne effoin shall be unto him allowed.

Provided alway, and be it enacted by the authority before said, that if any of the said printers, or sellers of printed books, inhabited within this realme, at any time hereafter happen in such wise to enhance and encrease the prices of any such printed books in sale or binding, at too high and unreasonable prices, in such wise as complaint be made thereof unto the kings highnesse, or unto the lord chancellor, lord treasurer, or any of the chief justices of the one bench or of the other: that then the same lord chancellor, lord treasurer, and two chief justices, or any two of them, shall have power and authority to enquire thereof, as well by the oaths of twelve honest and discreet persons, as otherwise by due examination by their discretions. And after the same enhaunfing and encreasing of the said prices of the said books and binding shall be so found by the said twelve men, or otherwise by examination of the said lord chancellor, lord treasurer, and justices, or two of them: that then the same lord chancellor, lord treasurer, and justices, or two of them at the least, from time to time, shall have power and authoritie to reform, and redresse such enhaunfing of the prices of printed books, from time to time, by their discretions, and to limit prices as well of the bookes, as for the binding of them: and
over

over that the offender or offenders thereof, being convict by the examination of the same lord chancellor, lord treasurer, and two justices, or two of them, or otherwise, shall lose and forfeit for every booke by them sold, whereof the price shall be enhanced, for the booke or binding thereof three shillings four pence, the one halfe thereof shall be to the kings highnesse, and the other halfe unto the parties grieved, that will complaine upon the same, in manner and forme before rehearsed.

[745]

To the end, that not onely this second part of the Institutes, but all other bookes of what argument soever, may be sold at reasonable prices, and that the subjects of this realme, being printers, and binders of bookes, may be set on worke, we have thought good in this treatise of statutes to conclude with this statute of 25 H. 8. 25 H. 8. cap. 15. cap. 15. which consisteth on these three parts :

1. That no inhabitant or resident within this realme shall buy to sell againe any printed bookes brought from any parts out of the kings obeyfance ready bound in boords, leather, or parchment.

2. Nor shall buy within this realme of any stranger borne out of the kings obedience, other then of denizens, any manner of printed bookes brought from beyond the seas, except onely by ingrosse, and not by retaile.

3. That the lord chancellor, lord treasurer, and the two chiefe justices, or any two of them shall have power to enquire as well by the oath of twelve men, as otherwise by due examination by their discretion, of the enhancing and encreasing of the prices of bookes, or binding of the same, and the same so found, they, or any two of them, from time to time have power to limit prices as well of the bookes, as for the binding of them, as by the said act appeareth.

Which we have thought good to adde, to the end it might be knowne what the law is in these cases; and that if any enhancing or encreasing of prices be either of the bookes, or the binding of them, that it may be knowne who may and ought to redresse the same.

The Epilogue.

THUS have we, by the mercifull goodnesse of Almighty God, brought this second part of the Institutes (a large and laborious volume) containing an exposition of Magna Charta, and many other ancient and later statutes, to an end; wherein we could not follow or be guided by any other, for that never any (that we have seen or heard of) have enterprised to publish the like in this kind: and therefore if the piercing eyes of the learned shall find out errors herein, we are not without some kind of excuse. And we desire them to amend and correct those errors, according to the true sense of law, for the which we shall not

not onely give them thanks, but subscribe to the truth, and take it as some recompence for those our manifold and painfull labours herein, which we from the beginning have undertaken for the generall good and profit of the whole realme.

Post varios casus, post tot discrimina rerum.

Nunc sequitur conclusio.

DEO gloria & gratia.

Jucunda est præteritorum laborum memoria.

Cic. lib. 2. fin.

[746]

Die Mercurii 12^o Maii, 1641.

UPON debate this day had in the Commons House of Parliament, the said House did then desire and held it fit, that the Heire of Sir Edward Coke, should publish in print the Commentary upon Magna Charta, the Pleees of the Crowne, and the Jurisdiction of Courts, according to the intention of the said Sir Edward Coke. And that none but the Heire of the said Sir Edward Coke, or hee that shall be authorised by him, do presume to publish in print any of the foresaid Bookes, or any Copy thereof.

H. Elfyng Cler. Domus Com.

Die Veneris 3^o Junii, 1642.

WHEREAS by an order dated the 12th of May, 1641, this House desired and held fit, that the Heire of Sir Edward Coke should publish in print the Commentaries of Magna Charta, the Pleees of the Crowne, and the Jurisdiction of Courts: and that none but the said Heire, or his assignes should presume to print the same: and where by another order of this House, dated the seventh of March last, it was ordered, that a bill should be drawn, for the preventing the re-printing of the said bookes for a time certaine to be assigned in the said bill, as by the said severall orders may appeare: according to which last mentioned order a bill was drawne and preferred to this House, and hath been once read: but in respect of the many great and weighty affaires of the kingdome, no further proceedings have been, or as yet can be had therein. It is this day ordered, that, forasmuch as one of the said books (*viz.*) the Comment upon Magna Charta

Charta is already printed, and ready to be published, and the other two also ready for the presse, that none but the said Heire of Sir *Edward Coke*, or he or they that shall be authorized by him, doe print or re-print, or cause to be printed or re-printed any of the said books, or any part of them, or any of them, before a full yeare after the publishing, and putting to sale of the same respectively: and that the Master and Wardens of the company of Stationers be required to take a speciall care for the due performance of this order; and if any shall notwithstanding presume to print or re-print, within the time aforesaid, any of the said books, or any part thereof (other then the said Heire or his assignes) that then they certifie their names, to the intent some course may be taken for the punishing of the offenders, as to this house shall seem meet.

H. Elsynge Cler. Parl. D. Com.

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